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IN THE
Supreme Court of the United States

EARL OLD PERSON, CAROL JUNEAU,
JOE MACDONALD, AND JEANNINE PADILLA,

Petitioners,

vs.

BOB BROWN, SECRETARY OF STATE FOR THE
STATE OF MONTANA; AND JUDY MARTZ,
GOVERNOR FOR THE STATE OF MONTANA,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the Court should vacate this case on the grounds of mootness and remand with a direction to dismiss because the 1993 legislative redistricting plan challenged in the complaint has been superseded by a new redistricting plan based upon the intervening 2000 census.

2. Whether the decision of the court of appeals conflicts with the decisions of this Court and those of other United States courts of appeals by failing to give the required weight to proof of the factors identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the legislative history as most probative of a violation of Section 2 of the Voting Rights Act.

3. Whether the decision of the court of appeals conflicts with the decisions of this Court and those of other United States courts of appeals by placing primary reliance upon the election of a minority candidate after the commencement of the litigation who had no major party opposition.

4. Whether the decision of the court of appeals conflicts with the decisions of this Court and those of other United States courts of appeals because of its failure to consider all the relevant evidence of minority vote dilution.

5. Whether the lower court erred in finding that the challenged redistricting plan was not adopted with a discriminatory purpose.

Corporate Disclosure Statement

This petition is filed on behalf of individuals. Counsel is provided by the American Civil Liberties Union. The ACLU is a corporation, but has no parent corporation and issues no stock, public or private.

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IN THE

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EARL OLD PERSON, CAROL JUNEAU, JOE MACDONALD, AND JEANNINE PADILLA,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Earl Old Person, *et al.*, respectfully petition for a writ of certiorari to vacate and dismiss as moot, or in the alternative to review, the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a - 26a) is reported at 312 F.3d 1036. The opinion of the district court (App., *infra*, 27a- 56a) is reported at 182 F.Supp.2d 1002. The first opinion of the court of appeals (App., *infra*, 57a-85a) is reported at 230 F.3d 1113. The first opinion of the district court (App., *infra*, 86a-147a) is unreported. The opinion of the court of appeals denying a petition for rehearing and rehearing *en banc* (App., *infra*, 148a) is unreported.

JURISDICTION

The court of appeals entered its opinion affirming the decision of the district court on December 4, 2002, and entered an order denying a petition for rehearing and rehearing en banc on April 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 2201, suit being authorized by 42 U.S.C. § 1973j(f) and 1983.

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (App., *infra*, 149a).

STATEMENT

Petitioners are tribal members and residents of the Blackfeet and Flathead Indian Reservations, which include portions of Flathead, Lake, Glacier, and Pondera Counties in northwest Montana. Twenty house and senate districts are included within this four county area. Petitioners contended that the state's 1993 legislative redistricting plan diluted Indian voting strength and was adopted with a discriminatory purpose in violation of Section 2 of the Voting Rights Act. A new legislative redistricting plan was adopted in 2003 based upon the 2000 census, which complies with Section 2 and renders this case moot.

Legislative redistricting in Montana is performed by a Districting and Apportionment Commission, whose members are appointed by the legislature every decade after release of the decennial census. The legislature has no power over the redistricting process, other than making recommendations. Upon the filing of a redistricting plan by the commission with the secretary of state, the plan becomes law and the commission is dissolved. Constitution of Montana, Article V, Section 14.

A. Proceedings Below

Following an initial trial in 1998, the district court dismissed the petitioners' complaint on the grounds that the redistricting plan did not dilute Indian voting strength and was not adopted with a discriminatory purpose. Petitioners appealed both of these findings.[1] The court of appeals vacated and remanded in *Old Person v. Cooney*, 230 F.3d 1113 (9th Cir. 2000) ("*Old Person I*"); App. 57a. It affirmed the trial court's finding of no discriminatory purpose but held that petitioners established the three primary factors identified in *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986), as probative of vote dilution under Section 2, *i.e.*, geographic compactness, political cohesion, and legally significant white bloc voting. *Old Person I*, 230 F.3d at 1121, 1127; App. 65a-67a, 76a-78a. The court also found that petitioners had established the existence of additional factors probative of vote dilution identified in the Senate report that accompanied the 1982 amendment of Section 2 as follows:

> There was a history of discrimination by the federal government and the State of Montana from the 1860s until as recently as 1971. American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process.

Id. at 1129; App. 80a-81a. The court further found that "in at least two recent elections in Lake County . . . there had been overt or subtle racial appeals,"[2] and that the trial court's finding of "proportionality . . . was erroneous." *Id.* The court directed the trial court on remand to reconsider its ruling in light of its "clearly erroneous finding that white

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1. Other plaintiffs in the litigation also challenged redistricting as it affected the Fort Peck, Fort Belknap, and Rocky Boy Reservations in the northeast part of the state. They did not appeal from the decision of the district court and their claims are not involved in this litigation.

2. Other Senate factors are the use of enhancing devices, the existence of a candidate slating process, and minority office holding. Two additional, subsidiary factors are a significant lack of responsiveness and tenuousness state policy. *Gingles*, 478 U.S. at 36-7.

bloc voting was not legally significant," and its erroneous finding of "proportionality between the number of legislative districts in which American Indians constituted an effective majority and the American Indian share of the voting age population of Montana." *Id.* at 1131; App. 84a-85a.

The evidence of purposeful discrimination included numerous statements by members of the commission made during executive sessions (which were taped) that can only be described as overtly racial and that showed an intent to limit Indian political participation. Commission members ridiculed the redistricting proposals submitted by tribal members as "idiotic" and "a bunch of crap." App. 133a. They called the tribes' demographer, whom they had never met, a "jackass," "some turkey from God-Knows-Where," a "dingaling," and an "S.O.B." App. 131a, 133a. One commissioner said that if "that bugger" shows up at a meeting "I'll toss him in the trees someplace." App. 131a. When a staff member mistakenly gave some of the commissioners blank pieces of paper instead of a tribal redistricting proposal, one commissioner remarked, "I got a blank one too . . . . [t]his is typical of them Indians." App. 131a. In response to requests from tribal members that any districting plan provide equal electoral opportunities to Indian voters, commission members suggested that all the Indians in the state be packed in one district. According to one commissioner, "give them one District and we go from there." App. 132a. The Indians, according to a commission member, didn't know what was going on: "you get somebody that's getting in there and stirring them up, yeah, they'll get to thinking hell's an icebox." Pl. Exh. 45, pp. 3-4. Another commissioner declared that "[i]f the federal government wants to redistrict Montana according to the Indian Tribes and the Reservations, they are going to have to do it. I am not going to do it." Pl. Exh. 43, p. 12. When the commission felt obligated to draw a majority Indian district, one commissioner lamented that "[w]e're being had here, ladies and gentlemen." Pl. Exh. 49, p. 2. Another commissioner added, "[a]nd we can't do anything about it." *Id.* Placing white residents in a majority Indian district would, according to one commissioner, "emasculate" white voters. App. 133a. In dismissing the purpose claim, the

district court held that the record did "not contain persuasive evidence of racial animus towards American Indians." App. 139a.

On remand, the district court conducted a second trial limited to evidence since the first trial and issued an order on January 24, 2002, once again dismissing petitioners' complaint. In direct contradiction of *Old Person I*, it held that "the proportionality factor is satisfied," and that Indians were proportionately represented. *Old Person v. Brown*, 182 F.Supp.2d 1002, 1012 (D.Mont. 2002) ("*Old Person II*"); App. 41a.

The court of appeals affirmed. *Old Person v. Brown*, 312 F.3d 1036 (9th Cir. 2002) ("*Old Person III*"); App. 1a. It held that Old Person I "is the law of the case," and affirmed all the court's prior findings showing vote dilution. *Old Person III*, 312 F.3d at 1039; App. 5a. In addition, and setting aside the finding of the district court once again, the panel held that Indians' share of majority-minority districts "is not proportional under either a four-county or a statewide frame of reference, [and that] the proportionality factor weighs in favor of a finding of vote dilution." *Id.* at 1046; App. 17a. But despite proof of the *Gingles* and other factors showing vote dilution, including the lack of proportionality, the panel concluded that Indian voting strength was not diluted because of "the absence of discriminatory voting practices, the viable policy underlying the existing district boundaries, the success of Indians in elections, and official responsiveness to Native American needs." *Id.* at 1050; App. 23a. The panel ignored the evidence presented by petitioners of the resolution of the 2000 Districting and Apportionment Commission, and statements of its individual members, that the 1993 plan diluted Indian voting strength.

B. The 2000 Redistricting Plan

A new districting commission was appointed after release of the 2000 census. On May 4, 2001, it adopted a resolution that:

> recognizes that the 2000 Census data and the evidence of racial bloc voting and other factors regarding the dilution of Indian voting strength identified by the courts in *Old Person* support the creation of an additional majority Indian House District and an additional majority Indian Senate District in the region of Montana that is dealt with in *Old Person*, in recognition of the rights of Indians on the Blackfeet and Flathead Reservations under Section 2 of the Federal Voting Rights Act of 1965.

Def. Ex. 511-R. The Commission, moreover, resolved to create such districts:

> so that the political processes leading to nomination or election to the Montana Legislature are equally open to participation by Indians and so that Indians have an equal opportunity with other members of the electorate to participate in the political process and to elect legislators of their choice for the 2004 and subsequent legislative elections.

Id.

Joe Lamson, a member of the commission, stated at the April 18, 2001, meeting of the commission that the 1993 plan "did result in voter dilution of our Native American population in Montana." Pl. Ex. 3A; Pl. Ex. 3, p. 20. Sheila Rice, another commission member, said that "I actually sat on that House Committee that reviewed this exact plan that was taken to Court . . and argued pretty strenuously that we were diluting the Native American population." *Id.* at p. 28. At the same meeting, Attorney General Mike McGrath acknowledged that the 1993 redistricting plan violated Section 2. "I think ultimately that we will not prevail in this litigation," he said, "that the Plaintiffs will indeed prevail." *Id.* at p. 9.

The commission submitted a redistricting plan to the legislature for recommendations on January 6, 2003. The plan provided for 100 house districts, six of which were majority Indian, and 50 senate districts, three of which were

majority Indian. A new majority Indian house district (HD 1) was created that included parts of the Flathead and Blackfeet Indian Reservations. HD 1, when combined with the preexisting majority Indian house district on the Blackfeet Reservation (HD 85), created a new majority Indian senate district (SD 1). *Old Person v. Brown*, Response to Appellants' Petition for Rehearing and Rehearing En Banc, Exhibit (Adopted House and Senate District, December 2002). The districts for the house contained a total deviation of 9.85%. Joint Legislative Committee on Districting and Apportionment, *Minority Report on SR 2 and HR 3 Regarding the Recommendation to the Montana Districting and Apportionment Commission* 2 (January 29, 2003) (hereinafter "*Minority Report on SR 2 and HR 3*").

Both the house and senate condemned the proposed plan and demanded that the commission adopt a new plan. The house, in a resolution passed on February 4, 2003, charged that "the 5% population deviation allowance contained in the plan was used for partisan gain," that the plan was "mean-spirited," "unacceptable," and that "the legislative redistricting plan must be redone." House Resolution No. 3, February 4, 2003. It also condemned the creation of majority Indian districts. The senate leveled virtually identical charges, and concluded that "the legislative redistricting plan must be redone." Senate Resolution No. 2, February 4, 2003.

The legislature enacted, and the governor signed into law on February 4, 2003, HB 309 which by its terms sought to invalidate the commission's plan and alter or amend the provisions of the state constitution. While Article V, § 14(1) of the state constitution provides that "[a]ll districts shall be as nearly equal in population as is practicable," HB 309 provided that the districts must be "within a plus or minus 1% relative deviation from the ideal population of a district." HB 309 further provided that "[t]he secretary of state may not accept any plan that does not comply with the [1% deviation] criteria."

On February 5, 2003, the commission met to consider the recommendations of the legislature, adopted a plan for

legislative redistricting, and filed the plan with the secretary of state. The secretary of state, however, refused to accept the plan. On the same day, represented by private counsel, he filed a complaint against the commission for declaratory judgment that the commissions's plan was unconstitutional and unenforceable for failure to comply with the population equality standard of HB 309. *Brown v. Montana Districting and Reapportionment Commission*, No. ADV-2003-72 (Mont. 1st Jud. Dist. Ct. Lewis & Clark County). Following a hearing, the state court ruled on July 2, 2003, that HB 309 was unconstitutional and that the secretary of state was required to accept the commission's plan. The secretary of state did not appeal but accepted the commission's plan for filing. It has now become the state's redistricting plan, superceding the 1993 plan challenged in this litigation.

REASONS FOR GRANTING THE PETITION

Petitioners believe that this case has become moot in light of the intervening adoption of a new redistricting plan by the state districting commission, and that the proper procedure pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is to reverse or vacate the judgment below and remand with a direction to dismiss the decisions of the lower courts. In the alternative, if the Court believes the case is not moot, petitioners submit that the petition should be granted because of the failure of the court of appeals to follow the decisions of this Court and those of other courts applying the vote dilution and discriminatory purpose standards of Section 2 of the Voting Rights Act.

I. This Case Has Become Moot

In light of the enactment of a new redistricting plan by the districting commission based on the 2000 census, this litigation has become moot. The 1993 redistricting plan challenged in this litigation has been superceded and is no longer in force or effect. Respondents, it should be noted, agree with this assessment. They argued at length in their brief opposing *en banc* review, and even prior to the final decision of the state court, that this case "has become moot"

and that there is "no longer . . . a live controversy over the 1990 plan." Brief of Appellees, pp. 5, 15.

Under Article III of the Constitution, federal courts may adjudicate only "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). The controversy, moreover, must be "extant" at all stages of review, and not merely at the time the complaint is filed. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1977). A controversy ceases to be extant, or becomes moot, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm. v. Geraghty*, 445 U.S. 388, 396 (1980).

In the event a case becomes moot on appeal, the procedure to be followed is set out in *Munsingwear*, in which the Court held:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

340 U.S. at 39. As the Court explained, such a procedure

> eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 40. The Court has consistently applied the *Munsingwear* doctrine of vacating decisions where review is prevented through happenstance to prevent the unreviewed decision from having any precedential effect. *Karcher v. May*, 484 U.S. 72, 83 (1987). *Accord*, *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) ("[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment"); *Board of*

Governors of the Federal Reserve System v. Security Bancorp, 454 U.S. 1118 (1981); *Allen v. Ellisor*, 454 U.S. 807 (1981).

Whether or not the 1993 plan violates Section 2 no longer constitutes an actual, ongoing case or controversy. *Lewis v. Continental Bank Corp.*, 494 U.S. at 477. Accordingly, the Court should vacate the judgment of the court of appeals and remand with directions to dismiss the prior opinions that have been entered in the case.[3]

II. The Court of Appeals' "Point Counting" Approach Was Error

The opinion of the court of appeals is in any event fundamentally inconsistent with *Thornburg v. Gingles*, the decisions of other courts of appeals on the relevance of proof of the *Gingles* and Senate factors, and the legislative history of the 1982 amendment of Section 2. The panel, treating them as if they were of equal importance, listed "[o]n one side of the scale" the various factors probative of minority vote dilution identified in *Gingles* and the Senate report, and listed "[o]n the other side of the scale" those that in its view did not show dilution. It then deferred to the balance struck by the district court as not being "clearly erroneous." *Old*

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3. In the court of appeals, and prior to the decision of the state court, petitioners argued that the case might not be moot because plaintiffs would arguably be entitled to special elections this year under a remedial plan in the event the court found that the 1993 plan violated Section 2. Petitioners acknowledge, however, that given the passage of time and the pendency of the 2004 elections they could not establish entitlement to special elections in 2003. As a practical matter, there is no longer enough time to hold them. Petitioners also argued that the case might not be moot because they were entitled to a declaratory judgment that the 1993 plan violated Section 2. Given the fact that the 2003 plan has now been adopted, that it provides petitioners all the relief they sought in their lawsuit and complies with Section 2, and that there are no pending challenges to the plan, a declaratory judgment would be academic or speculative and beyond the power of the Court to grant. *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

Person III, 312 F.3d at 1050; App. 23a.[4] In doing so, the panel resorted to the kind of "point counting" expressly rejected by Congress. The Senate report makes clear that courts should not use the Senate factors "as a mechanical 'point counting' device," and that "[t]he failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution." S.Rep. No. 94-417, 97th Cong., 2d Sess. 29 n.118 (1982), U.S. Code Cong. & Admin. News 1982, p. 207 n.118.

More fundamentally, the panel ignored the holding in *Gingles* that some of the dilution factors have greater "primacy" than others. 478 U.S. at 48 n.15. In *Gingles*, the Court held that in challenges to legislative redistricting the "conjunction" of three factors was most probative of whether the plan impeded "the ability of minority voters to elect representatives of their choice," *i.e.*, geographic compactness of the minority group, minority political cohesion, and legally significant white bloc voting. 478 U.S. at 48.[5]

The Court further identified "the most important" Senate factors in determining a Section 2 violation as the "extent to which voting in the elections of the state or political subdivision is racially polarized," and the "extent to which the minority group members have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 48 n.15. Noting the "primacy of the history and extent of minority electoral success and of racial bloc voting," the Court further held that "[i]f present, the other [Senate] factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance [dilution] . . . are supportive of, but *not essential to*, a minority voter's claim." *Id.* (emphasis in original). The panel, by treating the various Senate factors as

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4. Where, as here, a decision is infected with errors of law, no such deference is due. *Gingles*, 478 U.S. at 79.

5. The *Gingles* analysis applies to challenges to single member district plans. *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

being of equal weight, failed to follow the analysis required by *Gingles*.

The panel's "point counting" approach both devalued the importance of the primary factors showing dilution and inflated the value of those that are the least important. The panel, for example, counted "officials' responsiveness to Native American's needs" as being equal in weight on its "scale" as "racially polarized elections" and "disproportionality." *Old Person III*, 312 F.2d at 1050; App. 23a. The Senate report, however, provides that "[u]nresponsivess is not an essential part of plaintiff's case," and that "proof of some responsiveness would not negate" a Section 2 challenge. U.S. Code Cong. & Admin. News 1982, p. 207 n. 116. The House report is similarly clear that Section 2 "avoids highly subjective factors such [as] responsiveness.' H.Rep. No. 227, 97th Cong., 1st Sess. 30 (1981).

Indeed, the court in *Old Person I*, 230 F.3d at 1129 n.14; App. 81a, indicated that evidence of responsiveness was of "limited relevance." The decisions of other courts of appeals are to the same effect. *See McMillan v. Escambia County, Fla.*, 638 F.2d 1239, 1249 (5th Cir. 1981) ("[w]hether current office holders are responsive to black needs is simply irrelevant to that [§ 2] inquiry; a slave with a benevolent master is nonetheless a slave"); *United States v. Marengo County Comm'n.*, 731 F.2d 1546, 1572 (11th Cir. 1984) ("although a showing of unresponsiveness might have some probative value a showing of responsiveness would have very little"). The panel opinion, by elevating responsiveness to equal importance with legally significant racial bloc voting and proportionality, conflicts with *Gingles*, the legislative history, the law of the case in *Old Person I*, and opinions of other courts of appeals.

The panel also improperly inflated the importance of an alleged "viable policy" underlying the existing plan. *Old Person III*, 312 F.2d at 1050; App. 23a. The Senate report provides that whether the policy underlying a challenged practice is "tenuous" may have probative value "in some cases." U.S. Code Cong. & Admin. News 1982, p. 207.

However, the report further provides that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." *Id.* at n.117. Other courts of appeals have acknowledged that the tenuousness of state policy is of secondary importance under Section 2. *See, e.g., United States v. Marengo County Comm'n*, 731 F.2d at 1567 ("[s]tate policy is less important under the results test"); *LULAC v. Clements*, 986 F.2d 728, 753 (5th Cir. 1993) (same). The panel erred in elevating a "viable policy" to the same level of importance as racial bloc voting and proportionality, and in using it to negate the most important factors showing minority vote dilution.

While proof of the three *Gingles* factors is not conclusive, the Court held in *Johnson v. DeGrandy*, 512 U.S. 997, 1012 (1994), that "lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors." Numerous courts of appeals have acknowledged the primacy and importance of proof of the *Gingles* factors. In *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995), the court concluded that Section 2 "allows plaintiffs to establish a prima facie case of vote dilution by proving the three *Gingles*" factors. In *Harvell v. Blytheville School District. # 5*, 71 F.3d 1382, 1390 (8th Cir. 1995), the court held that "[s]atisfaction of the necessary *Gingles* preconditions carries a plaintiff a long way towards showing a Section 2 violation." *Accord, Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1116 n.6 (3rd Cir. 1993) (it would be a "rare case" in which a plaintiff successfully proved the existence of the three *Gingles* factors and still failed to establish a Section 2 violation); *Sanchez v. State of Colorado*, 97 F.3d 1303, 1322 (10th Cir. 1996) (same); *Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1390 (5th Cir. 1996) (same). If a trial court finds for a defendant despite the existence of the *Gingles* and other senate factors, it should be required to explain how the less important and vague elements of its analysis override those factors. Its failure to do so renders the clearly erroneous standard of appellate review meaningless.

Here, the panel failed to accord the *Gingles* and primary Senate factors the weight to which they were entitled and improperly concluded that they were trumped by factors of lesser or insignificant importance, such as responsiveness and viable state policy. The petition for a writ of certiorari should be granted because the panel opinion conflicts with opinions of the Supreme Court and other courts of appeals, and because of the overriding need for national uniformity in the application of Section 2.[6]

III. The Panel Placed Improper Reliance on the Election of an Indian Candidate

In concluding that Indians enjoyed proportional representation, the panel gave inordinate weight to the election of Joey Jayne, an Indian, in HD 73 in the 2000 election, noting that "the district court stressed evidence concerning the election of Joey Jayne." *Old Person III*, 312 F.2d at 1048; App. 20a. With the sole exception of Jayne's election from HD 73, the success of Indian candidates in the twenty district (13 house, 7 senate) area has been limited entirely to one majority Indian district (HD 85).

Indians currently represent only two (10%) of the 20 house and senate districts in the four county area. Based on total population, the Indian representation is only 66.7% proportional (10% ÷ 15% = 66.66%). Based on the "relevant population" used by the panel, the Indian representation is only 74.13% proportional (10% ÷ 13.49% = 74.13%). These figures do not permit a finding of proportional representation. It was simply illogical, and legal error, for the panel to conclude, where Indians do not in fact enjoy proportional representation, that "the factor of success in elections favored defendants." *Old Person III*, 312 F.3d at 1048; App. 20a. Under the panel's analysis, *any* Indian

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6. The panel complained that it was "quite difficult" to assess the impact of a practice alleged to dilute minority voting strength, *Old Person III*, 312 F.2d at 1049 n.14; App. 22a, but that is because it failed to follow the analysis provided in *Gingles*, which places primary reliance on verifiable and objective census and election data to determine the central issues of compactness, cohesion and polarized voting.

success would establish proportional representation and defeat a Section 2 challenge.[7]

Further, in refusing to consider Jayne's election as a "special circumstance," the panel opinion conflicts with *Gingles* and *Ruiz v. City of Santa Maria*, 160 F.3d 543 (9th Cir. 1998). According to the panel, "a theory that Jayne's election should be disregarded as 'special circumstances' is speculative and we cannot substitute our views for those of the district court." *Old Person III*, 312 F.2d at 1048 n.13; App. 20a. Terming this evidence "speculative" flies in the face of this Court, which cited the election of a minority in "the absence of an opponent" as a special circumstance which would not defeat a Section 2 claim. *Gingles*, 478 U.S. at 57. Here, Jayne had no opponent in the Democratic primary and no major party opposition in the general election. Pl. Ex. 8, p. 3; Pl. Ex. 9, p. 5. Such a special circumstance does not negate a finding of vote dilution.

Moreover, Jayne's opponent in the general election, Jore, ran as a Constitution Party candidate. The Constitution Party is an extremist party with an isolationist, anti-Indian platform. It favors repeal of the Voting Rights Act, the Federal Reserve Act, and the National Security Act; withdrawal from NATO, the UN, the IMF, and the World Bank; termination of foreign aid; and abolishing the Department of Education and the IRS. Constitution Party candidates made uniformly poor showings in the legislative contests in which they offered, except in HD 73 where Jore got 62% of the white vote, 49% of the total vote, and came within 54 votes of being elected. Pl. Ex. 10; ER, Pl. Ex. 2,

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7. The panel also said that in finding electoral success the "district court considered only Indian candidates and not Indian preferred candidates who were not Indian." *Old Person III*, 312 F.3d at 1047 n.12; App. 18a. To the contrary, the district court erroneously included a non-Indian (Roush from SD 43) in its equation. *Old Person II*, 182 F.Supp.2d at 1016; App. 48a. As important, Roush was *not* the candidate of choice of Indian voters. Pl. Ex. 2, p. 18, Table 1; p. 21, Table 4. The panel's deference to the district court's finding of proportional representation, which was in part erroneously based on Roush's election, was misplaced.

pp. 18, 20.[8] There is nothing "speculative" about the special circumstances surrounding Jayne's election, nor does it stand for the proposition that race is not a factor in elections nor that Indians can usually elect candidates of their choice. To the contrary, the unusual support for an extremist party candidate in HD 73 is a dramatic example of the "targeting" of a minority candidate by white voters. *See Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994).

The Senate report provides that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,'" noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." U.S. Code Cong. & Admin. News 1982, p. 207 n. 115 (citation omitted). Similarly , in *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), the three-judge court discounted black electoral success in elections following the filing of the complaint. The court concluded that:

> the success that has been achieved by black candidates to date is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunity to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state--either generally or specifically in the areas of the challenged districts.

590 F. Supp. at 367. In affirming, the Court held that where a challenged plan "generally works to dilute the minority vote, it cannot be defeated on the ground that it sporadically and serendipitously benefits minority voters." *Gingles*, 478 U.S. at 76.

In *Ruiz*, 160 F.3d at 558, the court held that where plaintiffs showed that "unusual circumstances" surrounded

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8. Where they faced candidates from both major parties, the best any Constitution Party candidate did was to get 9% of the vote. *Id.*

the election of a minority candidate, a district court "must discount the election results" in its *Gingles* analysis. The panel opinion conflicts with *Ruiz* and opinions of other courts of appeals holding that the election of a minority, particularly after litigation has begun, does not weigh heavily in the dilution equation. *See NAACP v. Gadsden County School Bd.*, 691 F.2d 978, 983 (5th Cir. 1982); *United States v. Marengo County Comm'n.*, 731 F.2d at 1572.

The panel's proportional representation holding is also in direct conflict with its finding that plaintiffs established the third *Gingles* factor. By concluding that Indians had an equal chance to elect candidates of their choice, the panel necessarily disregarded and contradicted its conclusion that whites voted as a bloc usually to defeat the candidates preferred by Indian voters.

The success that has been achieved by one Indian candidate in one majority white district is not only a special circumstance, but is too minimal and too recent in relation to the long history of denial of equal electoral opportunities to support the panel's conclusion that Indian voting strength is no longer diluted. The petition for a writ of certiorari should be granted because the panel opinion conflicts with opinions of this Court and other courts of appeals, and because of the overriding need for national uniformity in the application of Section 2.

IV. The Panel Ignored "Powerful" Evidence of Vote Dilution

The court of appeals completely ignored the conclusion of the Districting and Apportionment Commission that the 1993 plan diluted Indian voting strength. It also ignored the statements of commission members that the challenged plan diluted Indian voting strength, as well as the concessions of the attorney general that the state would lose the *Old Person* litigation.

Under Section 2 a court has a duty to make "a searching practical evaluation of the past and present reality" and take "a functional view of the political process." *Gingles*, 478

U.S. at 45. The panel could not discharge that duty by ignoring the findings of the commission, which is the very entity charged under state law with resolving issues of minority vote dilution and conducting legislative redistricting. In addition, the members of the commission and the attorney general were veterans of the political, legislative, and redistricting processes. They were in a unique position to provide the court with "a searching practical evaluation of the past and present reality" and "a functional view of the political process." It is indefensible that the panel ignored the statements of these public officials that Indian voting strength was diluted under the 1993 plan.

In *Miller v. Johnson*, 515 U.S. 900 (1995), in invalidating Georgia's congressional redistricting, the Court placed special reliance on public statements by the state's attorney general that the plan violated traditional redistricting principles. According to the Court, "[t]his statement from a state official is powerful evidence that the legislature subordinated traditional districting principles" in enacting the challenged plan. *Id.* at 919. The statements of General McGrath and members of the commission, as well as the formal findings of the commission, are also powerful evidence that the panel should have considered that the 1993 plan diluted Indian voting strength. As the court held in *Old Person I*, 230 F.3d at 1120; App. 64a-65a, a court "must" consider evidence relating to the totality of circumstances. The panel's failure to do so conflicts with decisions of this Court and those of courts of appeals and completely undermines the reliability of its decision.

V. The Lower Court's Racial Purpose Analysis Was Flawed

While petitioners are not required to prove a discriminatory purpose, *Gingles*, 478 U.S. at 35, both the Senate and House reports provide that proof of a discriminatory purpose would also constitute a violation of Section 2. S.Rep. No. 417 at 27; H.R. Rep. No. 277, 97th Cong., 1st Sess. 30, n.101 (1981). The Senate report incorporates the analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252,

264-68 (1977), for proof of a discriminatory purpose under Section 2. S. Rep. No. 417 at 27 n. 108. Aside from direct "smoking gun" evidence, factors probative of a discriminatory intent under *Arlington Heights*, 429 U.S. at 264-68, include: (1) whether the impact of the official action bears more heavily on one group than another; (2) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (3) the sequence of events leading up to the challenged decision; (4) any departures from the normal procedural sequence; (5) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and, (6) the legislative or administrative history, including contemporaneous statements by members of the decisionmaking body.

Here, the direct and circumstantial evidence of purposeful discrimination is overwhelming. The impact of the 1993 redistricting plan bears more heavily on Indians than non-Indians, an impact that was readily foreseeable. The historical background reveals that Indians were discriminated against in voting and other areas of life, and that in prior redistricting concentrations of Indian population were fragmented and the reservations divided into numerous house and senate districts. The contemporaneous record of the commission's proceedings reveals a series of official actions taken for invidious purposes. The commission refused to apply, or selectively applied, their mandatory and discretionary criteria when it came to Indians. The record is replete with statements by members of the commission indicating their disdain for Indians and civil rights, and their desire to contain Indian political participation to the greatest extent they thought possible.

Hunter v. Underwood, 471 U.S. 222, 228 (1985), provides that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Accord*, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). For burden shifting to apply, a

plaintiff is not required to prove that a discriminatory purpose was the "dominant" or "primary" purpose for the challenged practice or procedure, but only that it has been "a motivating factor" in the decisionmaking process. *Hunter v. Underwood*, 471 U.S. at 228. As the Court explained in *Arlington Heights*, 429 U.S. at 265:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. . . . But racial discrimination is not just another competing consideration. Where there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

The district court failed to apply the burden shifting analysis of *Hunter v. Underwood* and *Mt. Healthy* because it found no evidence of "racial animus." App. 139a. "Animus" means "a feeling of strong ill will or hatred." *Webster's New World Dictionary, Second College Edition* (1970). Intentional racial discrimination may often include an element of ill will or hatred, but it is not one of its essential elements. In *Miller v. Johnson* there was no contention that those who drew the challenged redistricting plan acted out of racial ill will or hatred. Indeed, the state's reason for adopting its plan was the non-racist one of complying with an objection by the Department of Justice under Section 5 of the Voting Rights Act. 515 U.S. at 921. Despite the absence of any racial animus, the Court found the state's plan was purposefully discriminatory in violation of the Fourteenth Amendment.

Whether or not the commissioners were biased against Indians, and there is abundant evidence that they were, they engaged in purposeful discrimination because they intentionally chose to dilute Indian voting strength in the Blackfeet-Flathead area. The district court thus erred in applying an incorrect legal standard of "animus" in its intent analysis, improperly discounted the substantial evidence that discrimination was a motivating factor in the commission's

decisionmaking process, and failed to apply the required burden shifting analysis. No matter what the standard of proof, the 1993 redistricting plan violates the purpose prong of Section 2.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Earl OLD PERSON; Carol Juneau; Joe MacDonald; Jeannine Padilla, Plaintiffs-Appellants,

v.

Bob BROWN, Secretary of State for the State of Montana; Judy Martz, Governor of the State of Montana, Defendants-Appellees.

No. 02-35171.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 7, 2002.

Filed Dec. 4, 2002.

Indians brought action under Voting Rights Act, challenging validity of Montana's state legislative redistricting plan. After remand, 230 F.3d 1113, the United States District Court for the District of Montana, Philip M. Pro, J., 182 F.Supp.2d 1002, held for state, and appeal was taken. The Court of Appeals, Gould, Circuit Judge, held that finding of no vote dilution was not clearly erroneous.

Affirmed.

Noonan, Circuit Judge concurred and filed opinion.

***1037** Lauglin McDonald, American Civil Liberties Union, Atlanta, GA, for the plaintiffs-appellants.

Sarah A. Bond, Assistant Attorney General, Helena, MT, for the defendants- appellees.

Appeal from the United States District Court for the District of Montana, Philip M. Pro, District Judge, Presiding. D.C. No. CV-96-00004-PMP.

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* West's pagination is shown by a star followed by a bold page number.

Before NOONAN, HAWKINS and GOULD, Circuit Judges.

OPINION

GOULD, Circuit Judge.

We enter again the turbulent and at times turbid waters of voting rights litigation. Four American Indian plaintiffs appeal the district court's judgment in favor of defendant officials of the State of Montana on the plaintiffs' vote-dilution claim under section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The district court held that the plaintiffs had standing to allege Native American vote dilution only with respect to the House and Senate Districts where they resided. Also, the court held that the plaintiffs had not shown vote dilution in the House and Senate Districts where they resided. Finally and alternatively, the district court held that, even if the plaintiffs had shown vote dilution, their claim failed because of the state's imminent redistricting and because any remedy would impermissibly disrupt the 2003 elections. We have jurisdiction pursuant to 28 U.S.C. § 1291. Concluding that the district court did not clearly err in determining that the totality of circumstances did not establish vote dilution in the districts where plaintiffs resided, we affirm on that ground.

I

The four Indian plaintiffs, Earl Old Person, Carol Juneau, Joe MacDonald, and Jeannine Padilla, are before us again in appeal of the district court's rejection after bench trial of their vote-dilution challenge to Montana's districting scheme under section ***1038** 2 of the Voting Rights Act.[1] The plaintiffs live on the Flathead and Blackfeet Indian Reservations, which are located in the four-county area including Flathead, Lake, Glacier, and Pondera Counties in

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1. This case is before us for review for the second time. *Old Person v. Cooney,* 230 F.3d 1113 (9th Cir.2000) ("*Old Person I*").

northwest Montana. Defendants Bob Brown and Judy Martz are officials of the State of Montana, with responsibilities relating to elections.

Montana is divided into House Districts and Senate Districts. Each Senate District is composed of two House Districts; there are 100 House Districts and 50 Senate Districts. One representative is elected from each district. The current plan contains five majority-Indian House Districts and one majority Indian Senate District. State Senators serve four-year terms, whereas members of the state House of Representatives serve two-year terms. According to the 1990 census, on which Montana's current districting plan was based, Native Americans comprise about 6% of the state's population. The 2000 census indicates that the population of the state has increased but that the Native American population has increased in greater proportion than the white population. Montana will automatically redistrict under its laws in 2003.

In the first trial, the district court entered judgment for the defendants after a bench trial. The district court rejected the plaintiffs' claims 1) that Montana's 1992 redistricting plan ("the 1992 plan") had been adopted for a discriminatory purpose and 2) that the 1992 plan impermissibly diluted the voting power of Native Americans. *Old Person I,* 230 F.3d at 1117.

We affirmed the district court's rejection of the first claim relating to discriminatory legislative motive but reversed the district court's judgment on the second claim of vote dilution. We held that the district court erred in relying on the electoral success of Indians in majority-Indian House Districts when evaluating the extent of white bloc voting, and in concluding that Native Americans were proportionally represented as a result of the 1992 plan. *Id.* We remanded, directing the district court to evaluate further whether vote dilution had occurred under the totality of the circumstances.

On remand, the district court heard additional evidence relating to the 1998 and 2000 elections. Only four out of the eleven plaintiffs who had been before us remained in the case. These four live in House Districts ("HD") 73 and 85, and Senate Districts ("SD") 37 and 43. The district court held that the plaintiffs had limited standing and to prevail

had to show, but did not show, vote dilution in the specific legislative districts where they resided. Also, the district court held that even if the plaintiffs had shown vote dilution, their claim failed because of the unavailability of an adequate remedy. The district court reasoned that the state would be redistricting in 2003, and the 2002 elections (the last elections to be conducted under the 1992 plan) were fast approaching. This appeal by the plaintiffs followed.

II

> We set forth the standard of review in *Old Person I:*
> We review for clear error the district court's findings of fact, including its ultimate finding whether, in the totality of circumstances, vote dilution exists in violation of § 2. ***1039** *Thornburg v. Gingles,* 478 U.S. 30, 78-79, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *Smith v. Salt River Project Agric. Improvement & Power Dist.,* 109 F.3d 586, 591(9th Cir.1997). We retain the power, however, " 'to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' " *Gingles,* 478 U.S. at 79, 106 S.Ct. 2752; *Salt River,* 109 F.3d at 591.

230 F.3d at 1119. The "clear error" standard generally requires that "[i]f the [trial court's] account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Phoenix Eng'g & Supply Inc. v. Universal Elec. Co.,* 104 F.3d 1137, 1141 (9th Cir.1997) (quoting *Anderson v. Bessemer City,* 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

In *Gingles,* the Supreme Court stressed that a finding of vote dilution should be reviewed under the clearly-erroneous test because the examination of a vote-dilution claim "is peculiarly dependent upon the facts of each case [ ] ... and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles,* 478 U.S. at 79, 106 S.Ct. 2752 (quotation marks and citations omitted). The Supreme Court has also stated that a district court's

factual findings in a vote-dilution case represent " 'a blend of history and an intensely local appraisal of the design and impact of the ... [voting] district in the light of past and present reality, political and otherwise.' " *Rogers v. Lodge,* 458 U.S. 613, 622, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (quoting *White v. Regester,* 412 U.S. 755, 769-70, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)).

III

Old Person I is the law of the case. "Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Richardson v. United States,* 841 F.2d 993, 996 (9th Cir.1988). The law of the case is a discretionary doctrine, which is

> founded upon the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal. This doctrine also serves to maintain consistency.

Jeffries v. Wood, 114 F.3d 1484, 1489 (9th Cir.1997) (en banc) (citations and quotation marks omitted). The "law of the case" doctrine is subject to the following exceptions: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* (citations, quotation marks, and footnote omitted). Here, none of the three exceptions applies. We are bound by the opinion of the prior panel as the law of the case. Also we have no discretion to depart from precedential aspects of our prior decision in *Old Person I,* under the general law-of-the circuit rule. *See Ross Island Sand & Gravel v. Matson,* 226 F.3d 1015, 1018 (9th Cir.2000) ("Since *Newton* remains the law of the circuit ... we are without authority to overrule its directives.").

IV

The district court concluded that the plaintiffs lacked standing to allege dilution beyond the House and Senate Districts ***1040** where they reside. We need not reach that issue. As our analysis makes clear, even if the plaintiffs had standing to allege vote dilution outside of their own legislative districts, that would not affect our holding that, under the totality of the circumstances, it was not clearly erroneous for the district court to determine that there was no vote dilution.

V

To evaluate the district court's findings, we must address the elements of a vote-dilution claim and the type of evidence that is relevant in assessing it.

In 1982, Congress amended section 2 of the Voting Rights Act to eliminate any intent requirement with respect to vote-dilution claims. Section 2 as amended is set forth in 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, ... as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.[2]

In *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court held that three preconditions must be satisfied before a plaintiff can proceed to a vote-dilution challenge:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multimember form of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed-usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51, 106 S.Ct. 2752 (citations and footnotes omitted).

Although *Gingles* involved a challenge to multi-member voting districts, the Court in ***1041** *Johnson v. De Grandy,* 512 U.S. 997, 1006-07, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), held that plaintiffs seeking to challenge a single-member districting scheme under section 2 of the Voting Rights Act must meet the three threshold requirements laid out in *Gingles.* Also, *De Grandy* reasoned that, especially in challenges to single-member districts, the *Gingles* preconditions must not be viewed as sufficient alone to

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2. In *Thornburg v. Gingles,* 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court described a vote-dilution claim after the 1982 amendments: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."

support a finding of dilution. *Id.* at 1012, 106 S.Ct. 2752.[3]

After a plaintiff has satisfied the *Gingles* preconditions, a court resolves a vote-dilution claim that a minority group has had less opportunity to participate in the political process, and to elect representatives of their choice, by evaluating the "totality of the circumstances," as is required by the statute in section 2(b). Such an evaluation, in turn, is to be guided by the factors identified in the Senate Judiciary Committee Majority Report, which accompanied the bill amending section 2 in 1982. These are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate

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3. The *De Grandy* Court also explained the difficulties in proving vote dilution based on single-member districts:

> Plaintiffs challenging single-member districts may claim, not total submergence, but partial submergence; not the chance for some electoral success in place of none, but the chance for more success in place of some. When the question thus comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, judgments about inequality may become closer calls. As facts beyond the ambit of the three *Gingles* factors loom correspondingly larger, factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution.

De Grandy, 512 U.S. at 1012-13, 114 S.Ct. 2647.

effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

***1042** S.Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. *See also Gingles,* 478 U.S. at 36-37 n. 4, 106 S.Ct. 2752 (citations and quotation marks omitted).

De Grandy added "proportionality" to the factors included in the totality of circumstances. *De Grandy,* 512 U.S. at 1013-14, 114 S.Ct. 2647. The Supreme Court explained that "proportionality" looks to "the political or electoral power of minority voters" rather than to "the success of minority candidates." *Id.* at 1014 n. 11, 114 S.Ct. 2647.

This established law guides our review of the district court's finding that vote dilution did not occur based on the totality of the circumstances.

VI
A

Relying on the "law of the case" doctrine, the district court readily adopted *Old Person I* 's conclusion that the *Gingles* preconditions had been satisfied. The district court concluded that a contrary determination was not necessary to avoid a manifest injustice. We agree. The determination that all three threshold preconditions in *Gingles* were met is not clearly erroneous.

We next consider the factors set out in *Gingles* and *De*

Grandy as having probative value in evaluating a vote-dilution claim to the extent they were generally not contested. We defer to a later section our discussion of the more controversial issues.

In *Old Person I,* we said that "[t]here was a history of discrimination by the federal government and the State of Montana from the 1860s until as recently as 1971. American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process." *Old Person I,* 230 F.3d at 1129. We also said that elections in some of the districts at issue were characterized by racial polarization, and that there had been overt or subtle racial appeals in two recent elections. *Id.* The district court adopted and gave weight to these conclusions, all of which are in the plaintiffs' favor. We consider each in turn.

The defendants argued that recent events showed progress in reducing discrimination against Native Americans in Montana, but the district court properly held that an inquiry into the history of discrimination against a minority group "focuses on a prior history of discrimination" and that here, our holding "constitutes the law of the case."

The district court accepted our determination that some elections in the districts at issue were racially polarized, and the court found that the evidence adduced on remand also supported this finding. The district court relied on both the plaintiffs' and defendants' statistical experts in reaching this conclusion. Nothing in the record shows that the district court's conclusion about racial polarization was clearly erroneous.

There was no new evidence concerning Native Americans' socio-economic status in Montana, and we had previously upheld the district court's finding that American Indians have a lower socio-economic status than whites in Montana, hindering the ability of Indians there to participate fully in the political process. *Old Person I,* 230 F.3d at 1129. The district court noted that no evidence had been presented showing that a particular change of district lines would cause Indians to "fare any better."

The absence of a proposed remedy is not a full answer to

analysis of this factor. Socio-economic status hindering election ***1043** participation is merely one factor in a total circumstances analysis of whether vote dilution has occurred. Whether or not new boundaries are suggested, this factor weighs in favor of a finding of vote dilution. The district court's reasoning shows tacit recognition of this, along with the not unsurprising observation that a redrawing of district lines would not fundamentally alter socio-economic status of Indians in Montana.

Similarly, there was no new evidence concerning the use of racial appeals in elections. We had previously upheld the trial court's finding that there were racial appeals in at least two recent elections in Lake County, which is within the plaintiffs' legislative districts. *See Old Person I,* 230 F.3d at 1129. This factor, too, weighs in favor of a finding of vote dilution.

The district court also considered factors that weigh against a finding of vote dilution. The district court noted that our prior holding upheld the trial court's finding that Montana had not used voting practices that may enhance discrimination, *id.,* and that the parties had presented no new evidence on this factor. The district court recited that, as we noted in *Old Person I,* Montana has no slating process, and again, there was no contrary evidence; we must conclude that Native Americans have not been denied access to such a process. *Old Person I,* 230 F.3d at 1129. The district court adhered to its prior conclusion, also previously affirmed by us, that Montana officials are "generally responsive" to the needs of Native American voters. Again, the district court said that no evidence introduced on remand would lead it to change the prior finding of responsiveness. But the district court, echoing our prior views, thought this of "limited relevance" under a result-based (rather than intent-based) test. *Old Person I,* 230 F.3d at 1129 n. 14. The district court also found, in accord with our prior determination upholding the district court's prior finding, that the policy underlying the creation of the existing district boundaries was not tenuous. On this point, again, nothing new was presented. All these findings weigh against vote dilution. There was no error in any of these findings, for all were the law of the case, and none fell within the limited exceptions to

that doctrine, particularly absent supervening evidence to the contrary.

B

We next consider the factor of "proportionality," which *De Grandy* taught was relevant. This issue generated some controversy in the district court, and because of unsettled law, it poses challenges in analysis.

As the Supreme Court has explained, "proportionality," a word not expressly used in the operative language of Section 2, involves a comparison between 1) the percentage share of legislative districts in which the population of the protected class has a majority[4] and 2) the protected class's percentage share of the "relevant population." *De Grandy,* 512 U.S. at 1014 n. 11.[5] The district court, doubtless affected ***1044** by its ruling on standing, limited the frame of reference for "proportionality" to the legislative districts where the plaintiffs reside, and it looked at the number of Indian-preferred candidates who had been elected in those and adjacent districts. The district court did not evaluate the

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4. Normally the protected class is one that is a minority in a relevant geographic area broader than a particular legislative district.

5. It must be kept in mind that "proportionality" in this sense is only one factor to be considered in assessing the totality of circumstances to determine if unlawful vote dilution has created an "unequal political and electoral opportunity" for a protected class. *De Grandy,* 512 U.S. at 1022, 114 S.Ct. 2647. Just as the Supreme Court in *De Grandy* made clear that "proportionality" of opportunity cannot be a "safe harbor" precluding Section 2 liability which turns on total circumstances, *id.* at 1018-22, 114 S.Ct. 2647, so too a showing of lack of proportionality is but one factor in the total circumstances analysis. It could not be correct to treat proportionality as but one factor if exculpatory while viewing it as a per se violation if inculpatory. In either case, the Supreme Court has made clear that "the degree of probative value assigned to proportionality may vary with other facts. No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1020-21, 114 S.Ct. 2647. We also address the significance of that factor in the overall assessment of vote dilution based on totality of circumstances, when we address *infra* whether the finding of no vote dilution was clearly erroneous.

share of districts in which the protected class of Indians constitutes a majority, as contrasted with the Indians' overall share of population in the broader relevant area.

Though the Supreme Court in *De Grandy* and we in *Old Person I* were not crystal clear in explaining how to assess the relevant geographic area for assessing "proportionality," and the district court's reasoning was understandable, we now conclude that the district court's method of assessing proportionality was not sufficiently precise and we seek to clarify our law on the calculation of proportionality.

The Supreme Court has suggested that proportionality is an aid to evaluate "equality of opportunity, not a guarantee of electoral success for minority- preferred candidates." *Id.* at 1014 n. 11, 114 S.Ct. 2647. We have not determined what geographical frame of reference should be used to analyze proportionality, whether it is by district, county, or state, and the Supreme Court has not resolved this issue. In view of our disposition, we do not determine all pertinent issues today. However, we consider whether the frame of reference for proportionality may be limited to the legislative districts where the plaintiffs reside.

While in this case it might favor the state to limit the frame of reference to the House and Senate Districts where the plaintiffs reside,[6] it might do the opposite and promote manipulative litigation if we were to adopt a rule that limits the proportionality analysis in this manner.[7] To look at

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6. If the frame of reference were limited in this manner, it would include only four legislative districts. One of those districts--HD 85-- is majority-Indian. Thus the share of legislative districts in which the population of the protected class has a majority is 25%. *Old Person I* shows that Indians constitute approximately 34% of the population in all four districts. *See Old Person I,* 230 F.3d at 1119. Within the limits of a four-district frame of reference, this correlation might indicate proportionality under *De Grandy.*

7. Consider the case of a minority group that makes up 21% of the population in a county with ten districts, with 100 people in each district. If the minority group has a 54% majority in two districts, then 20% of the districts in the county are "majority-minority" (by this we mean a district in which the minority group has a numerical majority), and there is

(continued...)

proportionality only for the districts where plaintiffs reside would encourage ***1045** litigation with selection of particular plaintiffs living in districts where the statewide minority does not have a majority. If success in those cases led to redistricting to enhance minority voting power, there would be a resulting injustice to other voters because the districting scheme would have minimized consideration of districts where the statewide minority had effective majority control. As the *De Grandy* Court explained,

> it would be absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power [significantly] above its numerical strength indicates a denial of equal participation in the political process. Failure to maximize cannot be the measure of § 2.

De Grandy, 512 U.S. at 1017, 114 S.Ct. 2647 (footnote omitted).

As the frame of reference expands from one legislative district or a set of legislative districts to a county or a set of counties or to the entire state, it becomes correspondingly more difficult to select plaintiffs in clusters that misrepresent their group's share of the overall population. We conclude that limiting the frame of reference to the plaintiffs' legislative districts would allow for an inaccurate proportionality calculus that may interfere with the goals of the Voting Rights Act. To hold otherwise would be to promote a result that the Sixth Circuit has correctly deemed to be impermissible under the Voting Rights Act--namely, to "enable future litigants to carve up successively smaller areas of the State until they are able to maximize the number of majority-minority legislative districts." *Rural W. Tenn.*

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7. (...continued)
proportionality under *De Grandy.* If the minority group also constitutes 25% of the population in another four districts in the county, and plaintiffs alleged dilution there, they might show a lack of proportionality by limiting the focus to those four districts, which might be a factor in causing those districts to be redrawn to create another majority-minority district. If that occurred, the minority group would have a majority in 30% of the districts in the county, while representing only 21% of the population. Those seeking such an outcome might select plaintiffs in a manipulative way to limit the frame of reference and distort the court's view of proportionality.

African-Am. Affairs Council v. Sundquist, 209 F.3d 835, 844 (6th Cir.2000) (citing *De Grandy,* 512 U.S. at 1017, 114 S.Ct. 2647).[8] As *Rural West* shows, it does not follow that a statewide frame of reference is always preferable to one that is limited to a county or several counties. However, we do not need to resolve the question of when it is appropriate to focus on a county rather than the entire state. It is enough to conclude that a frame of reference that is limited to certain legislative districts is impermissibly narrow.

Here, the plaintiffs argue that proportionality must be determined either by looking to the entire state or to the four-county region that includes the Flathead and Blackfeet Indian Reservations. Our holding that proportionality analysis could not here be limited to the districts of the plaintiffs' residence does not require us to choose between the state or the four counties as frame of reference. In either case, there is a lack of proportionality.[9]

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8. In limiting its focus to the legislative districts where the plaintiffs live, the district court also relied in part on *Rural West Tennessee African-American Affairs Council v. Sundquist,* 209 F.3d 835 (6th Cir.2000), which we had cited in *Old Person I. See Old Person I,* 230 F.3d at 1129 n. 15. In *Rural West,* the plaintiffs alleged vote dilution in six rural counties in western Tennessee, but Tennessee argued that the entire state was the proper frame of reference. The court limited its focus to the counties where the plaintiffs lived, for "neither over- proportionality in one area of the State nor substantial proportionality in the State as a whole should ordinarily be used to offset a problem of vote dilution in one discrete area of the state." *Rural West,* 209 F.3d at 843. The court concluded that because the presence or absence of statewide proportionality could not determine the vote-dilution claim of plaintiffs in a particular locality, a more limited frame of reference was appropriate. The *Rural West* court refused to use an over-broad frame of reference that could conceal evidence of vote dilution in a specific area, but also did not use an overly narrow frame of reference that could exaggerate such evidence.

9. In *Old Person I,* we held that the factor of proportionality weighed in favor of a finding of vote dilution if a statewide frame of reference was used, because Native Americans constituted 4.8% of the voting age population in Montana and 6% of the population in the state, but they had majorities in 2% of the Senate Districts and 4% of the total number of House and Senate Districts. *Old Person I,* 230 F.3d at 1129-30. The district court in the first trial considered the entire state in its proportionality

(continued...)

***1046** The district court, focusing on the four legislative districts where the plaintiffs reside, concluded that because "Indian-preferred candidates have been elected to the Montana legislature from both of the House Districts at issue and from one of the two Senate Districts at issue in this case, ... the proportionality factor is satisfied." The district court should have used a broader frame of reference, and instead of considering the number of Indian-preferred candidates who had been elected,[10] the district court should have considered

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9. (...continued)
analysis. On review, we noted:
Finally, with respect to proportionality, the district court found that the number of legislative districts in which American Indians constitute an effective majority is "roughly proportional to the American Indians' respective share of the voting age population in Montana."
Old Person I, 230 F.3d at 1129.
We found error in the proportionality assessment because, although Indians constituted 4.8% of the voting-age population of Montana, and 6% of the state's general population, only 2% of the Senate Districts were majority Indian, and only 4% of the combined House and Senate Districts were majority-Indian. *Id.* at 1129-30. On remand, the district court found that "statewide, the gap between the number of majority-minority districts to minority members' share of the relevant population has increased in Montana [since the decision in *Old Person I*]."
A focus on the four counties that include the Flathead and Blackfeet Indian Reservations would not change this result. The district court found that the Indian population in those four counties is 13.49%. Among the 13 House Districts and 7 Senate Districts that include some portion of those four counties, there is one majority-Indian House District (HD 85) and there are no majority-Indian Senate Districts. Thus 7.69% of the House Districts are majority-Indian, 0% of the Senate Districts are majority-Indian, and 5% of the total number of legislative districts are majority-Indian. We calculate proportionality by dividing the percentage of majority-minority legislative districts by the minority's percentage share of the population. *See De Grandy,* 512 U.S. at 1023 n. 19, 114 S.Ct. 2647. Here, proportionality is 55.9%, which we deem not reasonably proportional. Both a four-county and a statewide frame of reference would show a lack of proportionality.

10. In *Old Person I,* we held that the factor of proportionality weighed in favor of a finding of vote dilution if a statewide frame of reference was used, because Native Americans constituted 4.8% of the voting age population in Montana and 6% of the population in the state, but they had majorities in 2% of the Senate Districts and 4% of the total number of House and Senate Districts. *Old Person I,* 230 F.3d at 1129-30. The (continued...)

the Indians' share of majority-minority districts. Because that share is not proportional under either a four-county or a statewide frame of reference, the proportionality factor weighs in favor of a finding of vote dilution.

C

The district court also considered, and gave considerable weight to, the extent to which members of the minority group have been elected to public office. The district court found that Indians make up 13.49% of the population in the four-county area that includes the Flathead and Blackfeet Indian Reservations, and that 2 out of 20, or 10%, of the legislators representing those districts are Indian. The district court concluded that "proportional representation of

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10. (...continued)
district court in the first trial considered the entire state in its proportionality analysis. On review, we noted:
Finally, with respect to proportionality, the district court found that the number of legislative districts in which American Indians constitute an effective majority is "roughly proportional to the American Indians' respective share of the voting age population in Montana."
Old Person I, 230 F.3d at 1129.
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American Indians exists."[11]

***1047** While we do not look at "proportionality" in this sense, it is clear that the factors to be considered under section 2 in assessing vote dilution include the success of Indian or Indian-preferred[12] candidates in elections. While the district court looked solely to the plaintiffs' own legislative districts to analyze "proportionality" in the *De Grandy* sense, the court looked more broadly to the four-county area to determine representation in public office by Indian candidates. Both proportionality and success in elections are to be considered as part of the "totality of the circumstances," and both help us to understand the ability of members of the minority to participate in the political process and to elect representatives of their choice. It necessarily follows that the same frame of reference should be used for both inquiries. The Supreme Court has not expressly announced such a rule, and neither have we, in our prior decisions. However, courts that have analyzed "proportionality" in the *De Grandy* sense have been consistent in using the same frame of reference for that factor

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11. The district court's observation about "proportional" representation by those in public office, a fair share of persons elected favored by the Indians, is of course an assessment different from the "proportionality" inquiry mandated by *De Grandy*. We also note that the statute's proviso expressly recites that there is no right to proportional representation: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

12. The Supreme Court has required consideration of "the extent to which *members of the minority group* have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752 (emphasis added). Taken literally, this would allow for consideration only of minority candidates, and not of non-minority candidates who are preferred by the relevant minority. We believe such a view is unduly restrictive and does not reflect the realities of political behavior. That view does not, however, require us to resolve the dispute about who counts as an "Indian-preferred" candidate, see note 10 *supra*, because the same result would obtain here regardless of how that dispute is resolved. In finding that Indian voters had election success, the district court considered only Indian candidates, and not Indian-preferred candidates who were not Indian. Had the district court also considered the latter category, that would only have added further support for the court's conclusion.

and for the factors set forth in *Gingles*. *See, e.g., De Grandy,* 512 U.S. at 1022, 114 S.Ct. 2647(analyzing proportionality only for Dade County, and not statewide, where "the plaintiffs ... passed up the opportunity to frame their dilution claim in statewide terms" and instead applied the *Gingles* factors to "Hispanics in the Dade County area"); *Rural West,* 209 F.3d at 840-41 (using the same six-county frame of reference to examine proportionality and all of the *Gingles* factors); *Solomon v. Liberty County Comm'rs,* 221 F.3d 1218, 1220 (11th Cir.2000) (using the same county as a frame of reference in analyzing all factors); *African-Am. Voting Rights Legal Defense Fund, Inc. v. Villa,* 54 F.3d 1345, 1354-55 (8th Cir.1995) (using all 28 wards of the city of St. Louis as the frame of reference for analyzing both proportionality and the *Gingles* preconditions).

In *Old Person I,* we used a statewide frame of reference to consider success in elections, and we concluded that "the number of American Indians elected to the state legislature was 'roughly proportional' to the American Indians' share of the voting age population in Montana." *Old Person I,* 230 F.3d at 1129- 30. In the first trial, the district court made extensive findings on success of Indian-preferred candidates, which findings were upheld on appeal in *Old Person I.* On remand, the district court adhered to its prior conclusions about Indians' success in elections, and also further considered evidence concerning the election of a Native American candidate to HD 73, discussed below. ***1048** There was no error in the district court's conclusion; however, as noted above, the court's evidence of election success was drawn from the four- county area, not from the entire state. This was appropriate if the same four-county frame of reference is used in the proportionality analysis.

As set forth above, the district court reasoned that percentages of election success by Indian-preferred candidates bore some proportion to Indian numbers in the four counties. Neither we nor the Supreme Court has held that the same degree of correlation required by *De Grandy* in analyzing proportionality is also required in measuring the extent to which members of the minority group have been elected to public office. But while these two considerations may not involve exactly the same standard, a comparison

between share of population and share of elected officers is an obvious and helpful measure of success. It was not clear error for the district court to conclude that where Indians constituted 13.49% of the relevant population and held 10% of the elected offices in the four-county area, the factor of success in elections favored defendants. Indeed, we do not read section 2 of the Voting Rights Act to require any precise mathematical calculation of percentages of success in election. Such calculations may be misleading or give undue weight to what is only one of many factors listed in *Gingles*. What is important is that the district court consider the success in elections of the protected class. Neither the statute, nor the Senate report pertinent to its interpretation, nor the Supreme Court's teachings in *Gingles* or *De Grandy* require any particular form for the district court's assessment of election success.

In making its finding about election success, the district court stressed evidence concerning the election of Joey Jayne, a tribal member and an Indian- preferred candidate, in HD 73 in the 2000 election. Plaintiffs argue that this evidence has little weight because Jayne ran against a third-party candidate who came close to winning. But elections are not horseshoes, and having a close win is not the same as losing an election. The factor designated by the *Gingles* Court, success in elections, favors defendants when the protected class has had success.[13] That determination is not

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13. *Gingles* noted that in some cases, the election of a minority candidate does not negate a finding that there is bloc voting by a majority, because the candidate's success can be explained by "special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting." *Gingles*, 478 U.S. at 57, 106 S.Ct. 2752. Here, it can be argued that Jayne's election was a "special circumstance" entitled to little weight. Jayne was elected by a margin of 50.7% against a third-party opponent who received 49.3% of the vote. But a theory that Jayne's election should be disregarded as "special circumstances" is speculative and we cannot substitute our views for those of the district court. Even if a "special circumstance" has relevance to discount bloc voting, that is not controlling on how many minority candidates have been elected. That Jayne owes her success, in part, to running against a third-party candidate does not mean that her election should be ignored when determining minority candidates' success in elections. This factor falls within the fact-finding province of the district

(continued...)

the sole basis for evaluating the minority group's political power; it is one of the factors that make up the totality of the circumstances. The district court properly concluded that while Jayne's election does not show that there is no bloc voting in the four districts at issue, her election could be considered in determining the extent to ***1049** which minority candidates have been elected to office.

D

The district court found that factors indicating vote dilution included the history of official discrimination in the state; racial polarization of elections; socio-economic factors hindering political participation; and use of racial appeals in elections. Factors weighing in the other direction included the absence of voting practices that would enhance discrimination; absence of denial of access to a slating process; state officials' responsiveness to the needs of Indian voters; the absence of a tenuous policy underlying the creation of the existing district boundaries; and the election of Native Americans to public office. Lack of proportionality, which the district court included on the second list, in our analysis should have been added to the factors weighing in favor of vote dilution.

After weighing all pertinent factors, the district court concluded that the plaintiffs had not met their burden of establishing vote dilution. The district court's analysis of proportionality was erroneous, as we see it, because the proportionality analysis had to be made for a broader area than the districts where the plaintiffs reside. Of course, that analysis would only be one factor in the overall assessment, based on total circumstances, of whether there was vote dilution in the districts where plaintiffs resided. The court's assessment of success in elections by Indian candidates was not clearly erroneous.

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13. (...continued)
court charged with making the final finding on vote dilution. And of course success of Indian candidates is not a safe harbor or total defense, but again only one factor in a total circumstances analysis. *See De Grandy,* 512 U.S. at 1019-22, 114 S.Ct. 2647.

We must face the ultimate question as to whether our disagreement on proportionality analysis requires reversal. It is not an easy task for a district court to assess vote dilution. The language of the statute speaks in terms of equal opportunity for protected minority classes to participate in the electoral process. The consideration of a section 2(b) vote dilution claim by the statute's terms is to be made based on the "totality of circumstances." The Supreme Court in *Gingles* set forth a long line of factors relevant to the assessment, based on the Senate's report underlying the 1982 amendments. Initially, as explained in *Gingles,* this did not include proportionality, but the Court in *De Grandy* added proportionality as a factor, though without defining its contours precisely. The standards that we today derive from our assessment of *De Grandy* and other relevant considerations are nowhere set forth in explicit statutory language. Surely, it would be helpful if Congress or the Supreme Court were to revisit the thorny issue of vote dilution,[14] but absent clarification, district courts and we must proceed as carefully as possible based on settled grounds.

There are two things that are absolutely clear in the Congress's directive of section 2 of the Voting Rights Act and the Supreme Court's guidance on it. One is that an assessment of vote dilution, an insidious form of indirect discrimination, must be ***1050** made based on the "totality of circumstances." Whatever factors are to be considered, and indeed they are many and varied as explained by the

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14. It is perhaps not wholly insignificant that for decades Supreme Court precedent held that the question of legislative reapportionment based on equal protection challenges was not justiciable, a principle overruled in the landmark case of *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961), which permitted an equal protection challenge to legislative districts. Of course, in the Voting Rights Act Congress has laid squarely at the door of the federal courts the problem of assessing legislative districting and other election practices that may dilute rights of voters, particularly those of minority voters who rightly should not be shut out of the American electoral process. It is relatively easy to assess the issues and find judicial resolution in cases of intentional discriminatory practices. It is more of a challenge, and quite difficult, to assess issues of indirect impact of facially neutral policies that are urged to dilute voters' power at the polls.

Supreme Court, none is talismanic, none alone has controlling weight, none provides safe harbor, and none yields per se violation.

The other point that has been made perfectly clear by the Supreme Court is that in this unusual sphere of law, where legal principle may necessarily interact with the state or local legislature's sense of political practicality, the ultimate legal question whether vote dilution has occurred is to be treated as factual, and reviewed not de novo but rather for clear error. The Supreme Court's direction that we apply this standard, usually reserved for factual decisions based on credibility of witnesses and the like, to a question with at least mixed legal and factual aspects, must surely reflect the Supreme Court's decision that the congressional scheme will work best if the inherently factual issues of vote dilution are resolved by district courts close to the scene, and that the district court's decisions be given particular deference.

This is one of those not unusual cases where our decision is controlled by the proper standard of review. On one side of the scale lies a history of official discrimination, the presence of racially polarized elections, the presence of socio-economic factors limiting Indians' political participation, the use of racial appeals in elections, and disproportionality. On the other side of the scale we see the absence of discriminatory voting practices, the viable policy underlying the existing district boundaries, the success of Indians in elections, and officials' responsiveness to Native Americans' needs. We have fully considered the legal issues presented and the detailed factual record with which the district court grappled. We cannot say that the district court's determination that there was no vote dilution, considered in the totality of circumstances, was clearly erroneous.[15]

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15. The clearly erroneous standard requires us to view the evidence in its entirety, and does not allow us to reverse the district court simply because we would have weighed the evidence differently if we had been sitting as trier of fact. *Phoenix Eng'g & Supply Inc. v. Universal Elec. Co.*, 104 F.3d 1137, 1141 (9th Cir.1997) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

VII

The district court erred in alternatively holding that the plaintiffs' claims failed, even if they showed vote dilution, because of the district court's view that there was no adequate remedy for the alleged Voting Rights Act violation. We conclude that the integrity of the Voting Rights Act requires that a substantive assessment be made, even if the only practical relief available is declaratory relief after an election is held.

The plaintiffs submitted several proposed redistricting plans. The defendants dispute the adequacy of the plaintiffs' plans, but the district court did not rule on the plaintiffs' proposal, instead holding that the proximity of the next election cycle and of the state's own redistricting precluded any remedy.

The Eleventh Circuit has derived a remedy requirement from the Supreme Court's *Gingles* opinion and other Supreme Court precedent. *See Negron v. City of Miami Beach,* 113 F.3d 1563, 1571 (11th Cir.1997) (en banc). As the court explained in *Nipper v. Smith,* 39 F.3d 1494 (11th Cir.1994):

> The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under ***1051** the totality of the circumstances inquiry, a finding of liability. As we note above, a court cannot determine whether the voting strength of a minority group has been impermissibly diluted without having some alternative electoral structure in mind for comparison. Thus, where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.

Id. at 1533 (citations and quotation marks omitted). Even if we were to adopt the Eleventh Circuit's view of the remedy requirement, the district court appears to have improperly extended it by focusing, not on whether the plaintiffs provided an adequate redistricting plan, but on how disruptive redistricting would be. We think it correct, as the plaintiffs point out, that redistricting could not be

accomplished before the next pending elections. We also reject as unfeasible the plaintiffs' contention that the terms of the next state legislators could be shortened to allow another election without vote dilution. Injunctive relief of such a nature would be extremely disruptive to states and inconsistent with the relations between the federal government and the states. But to say that the plaintiffs should lose if they have an otherwise valid claim because of disruption would subject them to an impossible burden, and one that would defeat the purpose of the Voting Rights Act.[16] If a scheme that controls elections could escape scrutiny on the ground that it cannot be corrected in time, the effect would be to ignore a problem that is "capable of repetition, yet evading review." *Moore v. Ogilvie,* 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) (quoting *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n,* 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911)).

Although there will be no further proceedings in this case because of our affirmance of the district court's conclusion that there is no Voting Rights Act violation, had there been a finding of violation the district court could have given declaratory relief explaining the nature of the violation and how it might be avoided in the future. Because the state has plans to engage in redistricting on a regular basis, any problem could then have been corrected by the future redistricting and a ruling from the district court on the merits may aid those charged with redistricting duties.

VIII

We affirm the district court's ruling dismissing the Voting Rights Act claim based on the conclusion that there was no vote dilution.

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16. The Senate Report accompanying the 1982 amendment to 42 U.S.C. § 1973 notes that the purpose of the Voting Rights Act was "not only to correct an active history of discrimination, ... but also to deal with the accumulation of discrimination.... The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs."
S. Rep. No. 97-417, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. at 182 (quoting 111 Cong. Rec. 8,295 (1965) (Statement of Sen. Jarvis)).

AFFIRMED.

NOONAN, Circuit Judge, concurring:

The "turbid waters" of voting rights jurisprudence conceal shoals that precedent makes difficult to acknowledge:

First. It would appear that the most relevant figures would be the ratio of registered majority and minority voters. If registration is not taken into account, phantoms are compared. No doubt, past discrimination may have discouraged the minority from registering; but account ***1052** should be taken--possibly by polling--of how many now have qualified to vote.

Second. In any decent democracy, the quality of the candidates has some impact on the voters. Not every member of a racial or ethnic group votes blindly for a candidate from the group. If the district judge is to consider "the totality of the circumstances," the judge should be free to notice cases where a grossly inferior candidate from the majority was preferred to a much better qualified candidate from the minority or when a grossly inferior candidate from the minority was defeated by a much better qualified candidate from the majority. To be sure, judgment as to superiority or inferiority would require a political judgment from the judge; but so do the other factors the judge is required to consider.

Third. Use of race or ethnicity to defeat racial or ethnic bias is a dangerous remedy, like using a back fire to contain a fire. *See Ho v. San Francisco Unified School District,* 147 F.3d 854, at 864 (9th Cir.1998). Every time a federal court acts on the assumption that voters divide and vote on racial or ethnic lines reinforces stereotypes and stimulates thinking on racial or ethnic lines. Realistically it is necessary at times to employ this dangerous remedy, but it is a remedy to be used with keen awareness of its potentially inflammatory and reactionary effect. The rights of Americans are the rights of individuals, for which, at times, race or ethnicity acts as a surrogate. *Id.*

Earl OLD PERSON, Carol Juneau, Joe MacDonald, Jeannine Padilla, Plaintiffs,

v.

Bob BROWN, Secretary of State for the State of Montana; and Judy Martz, Governor for the State of Montana, Defendants.

No. CV-S-96-04-GF-PMP.

United States District Court,
D. Montana,
Great Falls Division.

Jan. 24, 2002.

American Indians brought action under Voting Rights Act, challenging validity of Montana's state legislative redistricting plan. After remand, 230 F.3d 1113, the District Court, Pro, J., held that: (1) Indians had standing to assert their vote dilution claims only in the Montana House and Senate Districts in which they resided, and (2) Indians failed to establish vote dilution under Montana's redistricting plan in the House and Senate Districts in which they resided.

Judgment for defendants.

***1003** Laughlin McDonald, Neil Bradley, Bryan Sells, American Civil Liberties Union Foundation, Inc., Atlanta, GA, Robert T. Coulter, Helena, MT, Trudy Flamand, Helena, MT, James P. Molloy, Hunt & Molloy, Helena, MT, Beth Brenneman, American Civil Liberties Union of Montana, Helena, MT, for Plaintiffs.

Mike McGrath, Montana Attorney General, Sarah A. Bond, Assistant Attorney General, Helena, MT, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRO, District Judge.

This action was commenced on January 12, 1996, pursuant to § 2 of the Voting Rights Acts of 1965, 42 U.S.C. § 1973. Plaintiffs seek declaratory and injunctive relief against continued use of Montana House and Senate legislative districts established by the 1992 redistricting plan, adopted by Montana's 1990 Districting and Apportionment Commission and the Montana legislature following the 1990 federal decennial census.

Plaintiffs Earl Old Person and Carol Juneau are residents and voters of Glacier County, Montana, and reside on the Blackfeet Indian Reservation within House District 73 and Senate District 37. Plaintiffs Joe MacDonald and Jeannine Badilla are residents and voters of Lake County, Montana, and reside on the Flathead Indian Reservation within House District 85 and Senate District 43. All Plaintiffs are American Indians and tribal members. ***1004** The current Defendants are Bob Brown, Secretary of the State of Montana, and Judy Martz, Governor of Montana.

In their Amended Complaint filed February 15, 1996, Plaintiffs assert two claims.[1] First, Plaintiffs contend that Montana's 1992 redistricting plan dilutes Indian voting strength in Montana House Districts 73, 74, 85, 86, 91, 92, 97 and 98, which are located in areas which encompass the Blackfeet and Flathead Reservations and are situated in portions of Flathead, Lake, Glacier, and Pondera Counties, and claim that an additional majority Indian House District and majority Indian Senate District should be drawn for the Montana legislature. Plaintiffs further allege that Montana's redistricting was "enacted and maintained" with a racially discriminatory purpose.

On October 27, 1998, following a bench trial, the United States District Court for the District of Montana, Paul G. Hatfield, Judge, entered Judgment for Defendants on both of Plaintiffs' claims.

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1. The Amended Complaint filed February 15, 1996, presented claims on behalf of sixteen named Plaintiffs. Only four of the original Plaintiffs remain in the action on remand.

Exactly two years later, on October 27, 2000, the Ninth Circuit Court of Appeals affirmed the trial court's ruling that Plaintiffs had failed to prove that Montana's Districting and Apportionment Commission adopted the 1992 redistricting plan with a discriminatory purpose in violation of § 2 of the Voting Rights Act. However, the Court of Appeals held that the trial court had erred in two respects. First, the Court of Appeals found error in the trial court's reliance on the electoral success of American Indians in majority- Indian House Districts when it concluded that white bloc voting in majority- white House Districts was not legally significant. Second, it found error in the trial court's finding with respect to "proportionality"--"the relation of the number of majority-Indian voting districts to the American Indians' share of the relevant population."[2] *Old Person v. Cooney,* 230 F.3d 1113, 1129 (9th Cir.2000). As a result, the Court of Appeals reversed the trial court's finding that Montana's 1992 redistricting plan did not dilute the voting strength of American Indians in violation of § 2. *Id.* at 1117.

The Court of Appeals remanded for retrial on the question of whether, in light of the totality of the circumstances, vote dilution had occurred; that is, whether under the 1992 redistricting plan, American Indians in the Montana House and Senate Districts at issue have " 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b); *see Johnson v. De Grandy,* 512 U.S. 997, 1013-14, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)." *Old Person,* 230 F.3d at 1117.

On May 7, 2001, the undersigned was designated from the District of Nevada to perform the duties of a United States District Judge for the District of Montana for this specific case. Trial was conducted at Helena, Montana, on November 5-6, 2001, and post-trial briefing was completed

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2. Earlier in its Opinion, the Court of Appeals characterizes the district court's second error as the conclusion that under Montana's 1992 redistricting plan, American Indians were proportionally represented. *Old Person,* 230 F.3d at 1117. However, it appears from the balance of the Opinion that the second error actually assigned related to the trial court's finding of "proportionality." *Id.* at 1129-30.

on December 27, 2001. Based upon the evidence adduced at the trial on remand combined with the facts established in the original trial conducted in 1998, and affirmed by the Court of Appeals, the Court ***1005** makes the following Findings of Fact and Conclusions of Law.

FACTUAL BACKGROUND

The trial court and Court of Appeals thoroughly articulated the process by which redistricting is accomplished decennially in the State of Montana:

> Since 1972, Montana's Constitution has granted the exclusive power to adopt a redistricting plan to a five-member Districting and Apportionment Commission. Although the Montana legislature can make recommendations to the Commission, it has no direct power over the geographic composition of legislative districts. The Commission itself is reconstituted every ten years in advance of the federal census. Commission members may not be public officials, although four of the five are appointed by a majority and minority leaders of each house of the state legislature. The four Commission members select the fifth member.
>
> The federal census in 1990 revealed that population changes in Montana between 1980 and 1990 had caused some legislative districts in Montana to become malapportioned, and potentially violative of the one-person one-vote requirement embodied in the Fourteenth Amendment. The 1992 Districting and Apportionment Commission therefore was required to draw a new redistricting plan. None of the five Commission members selected was an American Indian.
>
> The Commission held twelve regional public hearings beginning on April 3, 1992. Nine of these regional hearings were preceded by planning meetings that were open to the public. All of these hearings and meetings were recorded on audio tape; portions of these tapes were summarized or transcribed in the official minutes of the Commission. Statements made by Commissioners at these hearings and meetings form the basis for plaintiffs' claim that Commission members acted with a

discriminatory purpose. American Indians appearing before the Commission presented alternative districting plans. One of these plans, referred to as the "Blackfeet-Flathead Plan," contained an alternative districting proposal for the four challenged House districts that are the subject of this appeal.

After submitting its redistricting plan to the legislature for comment, the Commission filed its statewide redistricting plan with the Secretary of State on February 24, 1993. The plan (which we, like the district court, will continue to refer to as the "1992 redistricting plan") then became law, and the Commission dissolved.

Old Person, 230 F.3d at 1118.

In 1992, Montana's Districting and Apportionment Commission promulgated a redistricting plan increasing the number of majority-Indian House Districts from four to five. The 1992 redistricting plan contains one majority-Indian Senate District. Of the remaining House Districts in Montana, only four have an Indian voting age population of 11% or more. These four districts, H.D. 73, 74, 85 and 86, are the House Districts whose boundaries were challenged on appeal.[3] *Id.* at 1118-1119.

The Court of Appeals also affirmed the factual findings of the trial court on a variety of significant issues. American Indians comprise approximately 6% of the total population of Montana according to the 1990 Census. Montana's House of Representatives consists of 100 single-member districts with each member serving ***1006** a two-year term. Montana's Senate consists of 50 single- member districts, with each member serving a four-year term. Under the redistricting plan adopted in 1982, American Indians comprised a majority of the voting age population in one of the 100 House Districts (in Glacier County). American Indians did not represent a majority of the voting age population in any of the 50 Senate Districts under the 1982 redistricting plan. By 1990, Montana's demographics had changed and American Indians comprised the majority of the

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3. Plaintiffs did not appeal the trial court's findings of no vote dilution with respect to Montana House Districts 91, 92, 97 and 98.

voting age population in four of the one hundred House Districts and one of the 50 Senate Districts. *Id.* at 1117-1119.

DISCUSSION

A. Jurisdiction

This Court has subject matter jurisdiction over this voting rights action pursuant to 42 U.S.C. § 1973 and 28 U.S.C. § § 1331, 1343(a)(3) and (4).

B. Standing

The question of standing to sue is an important "threshold jurisdictional question." *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In voting rights cases, the United States Supreme Court has held that generally a plaintiff who resides outside the district at issue lacks standing to challenge the legislation that created that district "absent specific evidence that he personally has been subjected to a racial classification." *Shaw v. Hunt,* 517 U.S. 899, 903-904, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (analyzing an equal protection challenge to district boundaries). *See also Sinkfield v. Kelley,* 531 U.S. 28, 30-31, 121 S.Ct. 446, 148 L.Ed.2d 329 (2000) (analyzing an equal protection challenge to district boundaries).

In this case, Defendants insist that this Court must confine its "consideration of the evidence and its ruling" to the districts wherein the remaining Plaintiffs reside and thus have standing to sue under the Voting Rights Act of 1965, i.e., House Districts 73 and 85 and Senate Districts 37 and 43. In response, Plaintiffs do not suggest that they have standing to sue for relief in districts in which they do not reside, but maintain that Defendant confuses issues of jurisdiction with those relating to the relevance and admissibility of evidence with respect to election results in House Districts 74 and 86. Plaintiffs also argue that the Court of Appeals considered election results from House Districts 74 and 86 and urge this Court to continue to do so.

Old Person, 230 F.3d at 1124-25.

The Court concludes that the four remaining Plaintiffs to this action only have standing to assert their vote dilution claims in the Montana House and Senate Districts in which they reside. *United States v. Hays,* 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). As a result, any claim for relief entertained by this Court must be restricted to the House Districts 73 and 85 and Senate Districts 37 and 43. Nevertheless, the Court finds that evidence adduced at the trial on remand regarding the demographics and election results within House Districts 74 and 86 is relevant and admissible to the extent it informs the Court's totality of the circumstances analysis regarding Plaintiffs' vote dilution allegations as to House Districts 73 and 85 and Senate Districts 37 and 43.

C. Vote Dilution

To establish a violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, "[t]he American Indian plaintiffs must show 'that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [American Indians, a "language minority group" protected by the Act under 42 U.S.C. § 1973aa- 1a(e)] in that [their] members have less ***1007** opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " *Old Person,* 230 F.3d at 1120.

The vote dilution inquiry under § 2 involves two steps. *Old Person,* 230 F.3d at 1120. First, Plaintiffs must show three threshold conditions exist--the *Gingles* factors. *Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Specifically, Plaintiffs must show (1) the population of American Indians is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) American Indians are "politically cohesive" and (3) "the white majority votes sufficiently as a bloc to enable it in the absence of special circumstances ... usually to defeat the [American Indians'] preferred candidate." *Id.* Second, and only if the three *Gingles* factors are met, the "court must decide the ultimate question of vote

dilution. In doing so the Court must determine whether, 'on the totality of circumstances,' American Indians have been denied an equal opportunity to 'participate in the political process and to elect representatives of their choice.' " *Old Person,* 230 F.3d at 1120 (citing 42 U.S.C. § 1973(b)).

In *Gingles,* the Supreme Court pointed to an exemplary list of factors that are important in any § 2 vote dilution inquiry. *Gingles,* 478 U.S. at 44-45, 106 S.Ct. 2752. The factors were taken from a list in the Senate Judiciary Committee majority Report that accompanied the bill amending the Voting Rights Act in 1982. *Id.* at 36, 106 S.Ct. 2752. The "Senate Factors" to which the *Gingles* Court refers are:

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process";
> "2. the extent to which voting in the elections of the state or political subdivision is racially polarized";
> "3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group";
> "4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> "5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process";
> "6. whether political campaigns have been characterized by overt or subtle racial appeals";
> "7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are":
>
> > "[8.] whether there is a significant lack of responsiveness on the part of elected officials to the

particularized needs of the members of the minority group.

"[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Id. at 36-37, 106 S.Ct. 2752 (quoting S.Rep. No. 97-417 at 28-29 (1982) *reprinted in* U.S.C.C.A.N. 177, 206-07).

***1008** After extensive analysis of the record before the trial court, the Court of Appeals found that the three *Gingles* factors were met, satisfying the first step of the vote dilution inquiry. *Old Person,* 230 F.3d at 1120- 1128. The Court of Appeals ruled that the trial court had erred with respect to the third *Gingles* factor by finding that white bloc voting in majority- white House Districts was not legally significant, but the Court of Appeals, upon an examination of the evidence, held:

> Considering all this evidence in the aggregate, we conclude that the white majority in the four districts challenged on appeal 'vote sufficiently as a bloc to enable it...usually to defeat the [American Indians'] preferred candidate.' *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752.

Id. at 1127.

Having determined that Plaintiffs' had satisfied all three *Gingles* factors, the Court of Appeals next addressed whether the trial court correctly analyzed the factors relevant to its decision that the 1992 redistricting plan did not impermissibly impair the ability of American Indians to elect their preferred representatives. The Court of Appeals concluded that the trial court erred with regard to the factor of proportionality. *Old Person* 230 F.3d at 1129.

The Court of Appeals cited two of the Senate factors as being particularly important to the totality of the circumstances inquiry--racial polarization (Senate factor two, "the extent to which voting in the elections of the state or political subdivision is racially polarized"), and proportional representation (Senate factor seven, "the extent to which American Indians have been elected to public office in the jurisdiction"). *Old Person,* 230 F.3d at 1128 (citing *Gingles,* 478 U.S. at 48 n. 15, 106 S.Ct. 2752). The Court of Appeals also noted a third important factor--that of proportionality

("the relation of the number of majority-Indian voting districts to the American Indians' share of the relevant population").[4] *Id.* at 1129 (citing *De Grandy,* 512 U.S. at 997, 1014 n. 11, 114 S.Ct. 2647). Because in weighing the totality of circumstances the trial court "recited several factors favoring each side," the Court of Appeals determined that "the case is sufficiently close that we cannot know whether or not the district court would have found dilution if it had correctly assessed the factor of proportionality." *Id.* at 1130.

The Court of Appeals has thus narrowly focused this Court's role on remand to "correctly assess the factor of proportionality" and to reconsider the totality of circumstances in determining whether vote dilution has occurred. *Old Person,* 230 F.3d at 1130.

D. Law of the Case

The initial inquiry by the trial court and Court of Appeals into the *Gingles* threshold factors has been decided and constitutes the law of the case which this Court is bound to follow on remand absent a showing of clear error or manifest injustice. *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983), *reh'g denied,* 462 U.S. 1146, 103 S.Ct. 3131, 77 L.Ed.2d 1381 (1983), *decision supplemented by,* 466 U.S. 144, 104 S.Ct. 1900, 80 L.Ed.2d 194 (1984) (citing sources). Since the original trial of this case in 1996, which provided the record for review by the Court of Appeals, the 1998 and 2000 elections have occurred in Montana and the 2000 federal decennial census has been ***1009** completed. To a degree these events are relevant to this Court's vote dilution inquiry; more particularly to the question of whether a viable remedy is available to correct the effect of any vote dilution pending the completion of the work of the 2000 Montana Districting and Apportionment

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4. As explained by the Court of Appeals, "[p]roportionality is distinct from proportional representation. Proportionality relates to 'the political or electoral power of minority voters,' while proportional representation refers to the electoral success of minority candidates." *Old Person,* 230 F.3d at 1120 n. 5.

Commission. Neither party, however, has argued that a reexamination of the *Gingles* factors is warranted in light of the Montana elections conducted in 1998 and 2000 or the 2000 census, nor do those events indicate that reexamination of the *Gingles* factors is necessary to avoid a "manifest injustice." *Arizona* at 618, n. 8, 103 S.Ct. 1382. This Court, therefore, assumes that the *Gingles* factors were met and that only the totality of circumstances inquiry should be re-evaluated in accord with the findings of the Court of Appeals.

E. Proportionality

The Court of Appeals held that the trial court erred in its finding that the number of legislative districts in which American Indians constitute an effective majority[5] is "roughly proportional to the American Indians' respective share of the voting age population of Montana." *Old Person,* 230 F.3d at 1129-1130. In this regard, the Court of Appeals found that whether voting age population or total population was used as a measure of proportionality, there was arguably "rough proportionality" with respect to the House Districts, but not with respect to the Senate Districts, nor the Montana legislature as a whole. *Id.* at 1129-30. The 2000 census demonstrates that statewide, the gap between the number of majority-minority districts to minority members' share of the relevant population has increased in Montana. *De Grandy,* 512 U.S. at 997, 1014 n. 11. Indeed, the 2000 census reveals that American Indians now constitute 7.32% of the total population of Montana and 5.93% of the voting age population, compared with 6% of the total population and 4.8% of the voting age population under the 1990 census which was the subject of the original record in this case. At the very outset of its analysis of the trial court's finding of proportionality, the Court of Appeals drew attention to a significant but unanswered question:

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5. Under the 1992 redistricting plan, five of the one hundred Montana House Districts (5%) and one of the fifty Senate Districts (2%) are majority Indian.

> The district court considered the question of proportionality within the entire state, and not within a geographic subset, for example the eight districts challenged at trial or certain counties within the state. Because the parties do not object to the scope of the district court's inquiry, we need not decide whether the entire state is the proper "frame of reference" for a proportionality finding. *De Grandy,* 512 U.S. at 1021 n. 18, 1022, 114 S.Ct. 2647, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775, *see also Rural West Tenn. African American-Affairs Council v. Sundquist,* 209 F.3d 835, 843-44 (6th Cir.), *cert. denied,* 531 U.S. 944, 121 S.Ct. 340, 148 L.Ed.2d 273 (2000).

Old Person, 230 F.3d at 1130 n. 15.

The *Rural West* case cited by the Court of Appeals is particularly instructive on the issue of proportionality. *Rural West Tenn. African American-Affairs Council v. Sundquist,* 209 F.3d 835 (6th Cir.2000). In *Rural West,* plaintiffs residing in a rural region in western Tennessee challenged Tennessee's 1994 reapportionment of its legislative districts under § 2 of the Voting Rights Act of 1965. Affirming the trial court's finding that Tennessee's redistricting plan unlawfully diluted minority voting strength in rural western Tennessee, and noting the extreme lack of proportionality resulting from the fact that no African-American had been elected to the Tennessee legislature from the six-county ***1010** area at issue, the Sixth Circuit Court of Appeals focused extensively on the element of proportionality as explained by the United States Supreme Court in *De Grandy,* 512 U.S. at 997, 1024, 114 S.Ct. 2647 and *Shaw,* 517 U.S. at 899, 917, 116 S.Ct. 1894. *Rural West,* 209 F.3d at 842-844.

The *Rural West* court rejected Tennessee's argument that in evaluating proportionality, the trial court should have considered the entire state or an alternative area larger than the six rural counties in western Tennessee, maintaining that a statewide analysis would demonstrate substantial proportionality in favor of African-American representation. The Sixth Circuit Court of Appeals thereupon offered the following review of *De Grandy* and *Shaw,* the two leading cases from the United States Supreme Court on the issue of proportionality:

In *Johnson v. De Grandy,* the Supreme Court explicitly left open the question of the proper frame of reference for analyzing § 2 claims. *De Grandy,* 512 U.S. at 1022, 114 S.Ct. 2647, 129 L.Ed.2d 775 ("[W]e have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy."). Nevertheless, the reasoning in that case, and in *Shaw v. Hunt,* 517 U.S. 899, 917, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), persuades us that neither over-proportionality in one area of the State nor substantial proportionality in the State as a whole should ordinarily be used to offset a problem of vote dilution in one discrete area of the State.

In *De Grandy,* the State of Florida argued that, as a matter of law, no dilution occurs whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority voters' percentage of the relevant population. *De Grandy,* 512 U.S. at 1017, 114 S.Ct. 2647. Critiquing this "safe harbor" argument, the Supreme Court remarked on the State's "unexplored premise of highly suspect validity:"

> that in any given voting jurisdiction (or portion of that jurisdiction under consideration), the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class. Under the State's view, the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line.

Id. at 1019, 116 S.Ct. 1894, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775. Similarly, in *Shaw,* the Court considered North Carolina's argument that a bizarrely shaped majority-black congressional district was a narrowly tailored remedy for a § 2 violation elsewhere in the State. *Shaw,* 517 U.S. at 916-17, 116 S.Ct. 1894. Finding this position "singularly unpersuasive," the Court states:

> If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State....
>
> ...To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot ***1011** equal among voters), belongs to the minority as a group and not to its individual members. It does not.

Id. at 917, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207. Taken together, the admonitions of *De Grandy* and *Shaw* dissuade us from accepting Tennessee's invitation to append Shelby County, or the State as a whole, to the geographical frame of reference that the plaintiffs have selected because to do so would require us to trade the § 2 rights of individual African-Americans in rural west Tennessee against those of African-American groups elsewhere in the State.

The State complains that by allowing the plaintiffs to define the frame of reference for their § 2 claim, we will enable future litigants to carve up successively smaller areas of the State until they are able to maximize the number of majority-minority legislative districts--a result not countenanced by the Voting Rights Act. *See De Grandy,* 512 U.S. at 1017, 114 S.Ct. 2647, 129 L.Ed.2d 775 ("Failure to maximize cannot be the measure of § 2."). As the district court pointed out, however, the *Gingles* preconditions operate to prevent just the sort of limitlessly small "reverse gerrymander" whose specter the State raises here. *See, e.g., Campos v. City of Houston,* 113 F.3d 544, 547-48 (5th Cir.1997)(holding that minority group was not sufficiently large and geographically compact to sustain a § 2 claim). In this regard, we note that the region selected by the plaintiffs in this case is a sensible one-- indeed, more sensible than the seven-county area including Shelby County urged by the State. While Shelby County is the southernmost and

> westernmost county in the State, and, like the six neighboring counties of rural west Tennessee, has a large African-American population, the seven counties do not form a coherent demographic unit. The African-American population in Shelby County is concentrated in inner-city Memphis, and is largely set off from rural west Tennessee by a "buffer zone" of white suburbs. As a result, the African- American populations in these two areas are not likely to be particularly cohesive. For this reason, the district court properly restricted the geographic scope of relevant statistical date to the six counties of rural west Tennessee.

Rural West, 209 F.3d at 843-44.

Reference to this extensive excerpt from *Rural West* is instructive because it demonstrates that the presence or absence of statewide proportionality in Montana cannot be determinative of the narrow vote dilution issue to be addressed by this Court on remand with respect to House Districts 73 and 85 and Senate Districts 37 and 43. As is so thoroughly discussed in *De Grandy,* the existence of statewide proportionality does not provide a safe harbor for "blatant racial gerrymandering" in portions of a legislative district. *De Grandy,* 512 U.S. at 1019. Conversely, the absence of proportionality on a statewide basis as is clearly evident in Montana, does not compel a conclusion of vote dilution in the particular House or Senate Districts at issue. A finding of vote dilution in each District at issue requires sufficient evidence that district-wide proportionality is lacking or other factual evidence of vote dilution actually exists in those Districts.

The record before the Court amply support the finding of the Court of Appeals that on a statewide basis, proportionality within the State of Montana is lacking. However, given that Indian-preferred candidates have been elected to the Montana legislature from both of the House Districts at issue and from one of the two Senate Districts at issue in this case, the Court concludes that if proportionality is evaluated within the relevant geographic ***1012** subset which this Court is called upon to assess on remand, the proportionality factor is satisfied. At a minimum, the question of whether proportionality should be assessed on a

statewide basis or within the particular geographic subset before the Court for decision illustrates why the presence or absence or proportionality is not determinative on the issue of vote dilution but remains an additional factor which the Court should consider under the totality of circumstances. *Old Person,* 230 F.3d at 1130 n. 16. The Court therefore finds it appropriate to review the Senate factors previously addressed by the trial court and the Court of Appeals in light of the evidence and arguments presented by the parties with respect to the 1998 and 2000 Montana elections and the 2000 federal decennial census.

F. Totality of Circumstances--the Senate Factors

1. History of Official Discrimination Affecting American Indians' Right to Vote

The trial court's prior determination that American Indians suffered from a history of discrimination by the federal government and the State of Montana was upheld by the Court of Appeals. Defendants argue that the "tide has turned" with respect to discrimination against American Indians. In this regard, Defendants cite the election of six American Indians to the Montana legislature in 2000, the appointment of one of the original Plaintiffs in this lawsuit, Janine Pease Pretty on Top, as Chair of the current Districting and Apportionment Commission, and the express Resolution of the 2000 Commission that it intends to create additional Indian-majority districts. Plaintiffs respond that because Ms. Pretty on Top was appointed, not elected, her position is less probative of the fact that discrimination against Indians has waned. Plaintiffs also argue that five of the six Indians elected to the Montana legislature were from majority-Indian districts, which shows that majority Indian districts are "generally necessary for Indian voters to have an equal opportunity to elect candidates of their choice."

The Court finds that the record does reveal progress in reducing discrimination against American Indians in the State of Montana. However, as this particular Senate factor focuses on a prior history of discrimination and constitutes the law of the case based upon the record before the Court of

Appeals in *Old Person,* this Court finds no basis to revisit the finding of the trial court as affirmed by the Court of Appeals.

2. Extent to Which Elections are Racially Polarized

The Court of Appeals upheld the trial court's prior finding that most of the elections in the challenged districts involving an American Indian and a white candidate were racially polarized. *Old Person,* 230 F.3d at 1129. Citing the expert testimony of Dr. Steven P. Cole based on bivariate ecological regression analysis ("BERA") and homogeneous precinct analysis, Plaintiffs argue there was racial polarization in the three Indian/white contests in 1998 and 2000. Plaintiffs also argue that Cole's BERA and homogeneous precinct analysis show racially polarized voting patterns for the four white/white contests in 1998 and 2000. Overall, Plaintiffs argue that eight out of nine legislative contests were polarized. Defendants argue that Dr. Cole's testimony is not credible, and that the use of the King methodology by Defendants' expert, Dr. Jeffrey Zax, was superior to Cole's analysis. This Court finds that the trial evidence demonstrates there was continued racial polarization as claimed by Plaintiffs in the 1998 and 2000 legislative contests evaluated by Drs. Cole and Zax.

*1013 *3. Extent to Which the State Has Used Voting Practices or Procedures that May Enhance Discrimination Against American Indians*

The Court of Appeals upheld the trial court's finding that "Montana does not have unreasonably large election districts, anti-single shot provisions, or other voting practices that enhance the opportunity for discrimination against Indian voters." *Old Person,* 230 F.3d at 1129. The parties have presented no new evidence on this factor.

4. Whether American Indians Have Been Denied Access to a Candidate Slating Process

The Court of Appeals noted that Montana does not have a candidate slating process. *Old Person,* 230 F.3d at 1129.

5. *Extent to Which American Indians Bear the Effects of Discrimination in Areas Which Hinder Their Ability to Participate Effectively in the Political Process*

The Court of Appeals upheld the trial court's finding that "American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process." *Old Person,* 230 F.3d at 1129. The parties have not presented new evidence with respect to this factor, and hence there is a notable lack of evidence that American Indians would fare any better in terms of their access to the political process if this Court were to order immediate district boundary changes.

6. Whether Political Campaigns Have Been Characterized by Overt or Subtle Racial Appeals

The Court of Appeals sustained the trial court's finding that "in at least two recent elections in Lake County, which is within the four districts challenged on appeal, there had been overt or subtle racial appeals." *Old Person,* 230 F.3d at 1129. The parties have presented no new evidence with respect to this factor.

7. Extent to Which American Indians Have Been Elected to Public Office

The trial court made extensive findings regarding the election of American Indians to public office in Montana in recent years. *Old Person v. Cooney,* No. 96-004 at 46-47 (D. Mont. filed Oct. 27, 1998). Although the Court of Appeals assigned error to the trial court's reliance in part on the electoral success of Indian candidates in majority-Indian House Districts when it concluded that white bloc voting in majority-white House Districts was not legally significant, *Old Person,* 230 F.3d at 1117, it did not otherwise disturb the trial court's findings with regard to which American Indians have been elected.

Plaintiffs argue that the election of Joey Jayne, a tribal member and the Indian-preferred candidate in HD 73 in the

2000 election, does not undermine a finding of legally significant white bloc voting. Plaintiffs claim that the election of Jayne was the result of a "special circumstances election" because Jayne had no opponent in the Democratic primary, and only a third party (Constitution Party) opponent in the general election. Regardless, Plaintiffs contend that the election of an American Indian does not weigh heavily in the "dilution equation." Finally, Plaintiffs argue that American Indians have not achieved proportional representation in Glacier, Pondera, Flathead, and Lake Counties because the percentage of representation calculated by Defendants in their Post-Trial Remand Brief is 10%, whereas the Indian percentage of the population is 13.49%. Defendants respond that Plaintiffs ***1014** offered no witnesses with any personal information about the Jayne-Jore race. Defendants argue that, because American Indians make up 13.49% of the total population of Glacier, Pondera, Flathead, and Lake Counties, and because two of the twenty legislators representing that area are American Indian, proportional representation of American Indians exists.

Nothing adduced at the trial on remand persuades the Court that the findings of the trial court regarding the extent to which American Indians have been elected to public office should be disturbed. Those election results as well as the 2000 election of Joey Jayne do not, as the Court of Appeals has held, support a conclusion that white bloc voting in majority-white House Districts is not legally significant. However, they do support this Court's finding that proportional representations of American Indians exist in the four legislative districts at issue in this case.

8. Elected Officials' Responsiveness to the Needs of American Indians

The Court of Appeals upheld the trial court's finding that Montana state officials are "generally responsive" to the needs of American Indians, though it noted that such responsiveness on the part of state officials "may be of 'limited relevance.' " *Old Person,* 230 F.3d at 1129 n. 14. The Court finds no basis in the evidence adduced at the trial on remand to disturb the trial court's earlier finding.

9. Whether the Policy Underlying the Use of the Voting Practice is Tenuous

The Court of Appeals upheld the trial court's finding that the "policies underlying the creation of the existing district boundaries were not tenuous." *Old Person,* 230 F.3d at 1129. The parties have presented no new information with respect to this factor.

G. Proceedings before the 2000 Montana Districting and Apportionment Commission

On April 18, 2001, the 2000 Montana Districting and Apportionment Commission conducted its first public meeting (see Plaintiffs' Ex. 3) and on May 4, 2001, adopted Commission Resolution # 1 (see Defendant's Ex. 511-R, attachment 1). At the Commission meeting, Mike McGrath, Attorney General of Montana, made statements which Plaintiffs contend constitute an admission that Montana's 1992 redistricting plan violates § 2 of the Voting Rights Act as well as the view that Plaintiffs would ultimately prevail in the instant litigation. Plaintiffs also cite Attorney General McGrath's statement (that vote dilution of the Native American population in Montana and lack of proportionality will result in the creation of an additional Senate District in the Lake and Glacier County areas) as evidentiary support for Plaintiffs' claim of vote dilution in this case. More particularly, Plaintiffs cite to the following portion of Commission Resolution # 1 adopted May 4, 2001, as supporting their claim:

> ... The 2000 census data and the evidence of racial bloc voting and other factors regarding the dilution of Indian voting strength identified by the courts in *Old Person* support the creation of an additional majority Indian House district and an additional majority Indian Senate district in the region of Montana that is dealt with in *Old Person,* in recognition of the rights of Indians on the Blackfeet and Flathead Reservations under § 2 of the federal Voting Rights Act of 1965.

Defendant's Exhibit 511-R, Attachment 1 (expert report of Susan Byorth Fox). In addition, Plaintiffs note that the 2000

Montana Commission resolved to redistrict Montana's legislative districts:

> ***1015** ... so that the political processes leading to the nomination or election to the Montana legislature are equally open to participation by Indians and so that Indians have an equal opportunity with other members of the electorate to participate in the political process and to elect legislators of their choice for the 2004 and subsequent legislative elections.

Id.

Defendants offer an array of evidentiary objections to admission of the foregoing statements attributed to Attorney General McGrath and the 2000 Montana Commission, including the argument that they constitute out-of-context and inadmissible hearsay by an attorney discussing settlement negotiations pertaining to the instant case and by a Commission which is not a party to this action.

The Court concludes that Plaintiffs' Exhibit 3 and Defendant's Exhibit 511-R should be received. To the extent they constitute hearsay declarations, the Exhibits are undeniably trustworthy and relevant to these proceedings on remand, at least insofar as they speak to the issue of the role of the 2000 Montana Commission in fashioning a viable remedy should vote dilution be found to have occurred within the Districts at issue. The Court finds they do not, however, constitute an admission of a Voting Rights Act violation with regard to the particular House and Senate Districts at issue in this case. Instead, they more broadly speak to the responsibilities of the 2000 Montana Districting and Apportionment Commission in redistricting the entire State of Montana pursuant to their Montana constitutional mandate.

H. Conclusion Regarding Vote Dilution

In addressing the foregoing factors, the trial court made the following finding which is undisturbed on appeal:

> In applying these factors, the court must keep certain additional considerations in mind. First, the above-described list of relevant factors is exemplary, not exclusive. Second, there is no requirement that any

> particular number of factors be proved or that a majority of the factors point one way or another. Third, whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and upon a functional view of the political process. *Thornburg v. Gingles,* 478 U.S. 30, 46, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). 'In other words, scrutinizing electoral systems for Voting Rights Act violations is not an exact science.' *Askew v. City of Rome,* 127 F.3d 1355, 1379 (11th Cir.1997).

Old Person v. Cooney, No. 96-004 at 69 (D. Mont. filed Oct. 27, 1998).

On remand, this Court was not called upon to reconsider whether all three of the primary factors identified in *Gingles* were satisfied or whether statewide proportionality was lacking in Montana. The Court of Appeals has already assigned the errors in the trial court's findings and has made those determinations. This Court on remand is solely called upon to decide whether or to what extent the errors made by the trial court may have affected the ultimate finding that there was no dilution of American Indian voting strength. *Old Person,* 230 F.3d at 1131. This Court's focus is further narrowed, as it must be, to the House and Senate Districts in which the four remaining Plaintiffs reside and thus, have standing to sue.

Thus focused, this Court has re-examined the totality of the circumstances in light of the errors corrected by the Court of Appeals and as augmented by the evidence adduced at the trial on remand. The Court concludes that Plaintiffs have not met their burden of establishing vote ***1016** dilution in House Districts 73 and 85 and Senate Districts 37 and 43 under Montana's 1992 redistricting plan. Indeed, the fact that of the four districts at issue, both House Districts and one Senate District are already represented by Indian-preferred candidates strongly suggests that American Indians have an equal opportunity to elect candidates of their choice in the particular districts in which Plaintiffs in this action have standing to sue. This fact alone illustrates the success of American Indian candidates (proportional representation) and the electoral power of American Indian voters (proportionality) within the Districts at issue in this case. *De*

Grandy, 512 U.S. at 1014 n. 11, 114 S.Ct. 2647. The totality of the remaining circumstances weigh in favor of the Court's finding that there is no vote dilution in the remaining Districts in controversy in this case.

I. The Necessity of a Viable Remedy

Ordinarily, the Court's finding that Plaintiffs have failed to prove vote dilution in the Districts at issue would end the inquiry. Defendants, however, assert an additional argument that was apparently not raised before the Court of Appeals or in the original trial in this case: even if this Court were to find that vote dilution exists, it could not find a violation of § 2 of the Voting Rights Act unless it determined that a constitutionally acceptable remedy exists. The Ninth Circuit Court of Appeals has not addressed the issue of whether a viable remedy is an essential element of a § 2 claim. Defendants, however, cite the Court to *Nipper v. Smith,* 39 F.3d 1494 (11th Cir.1994) in which the Eleventh Circuit Court of Appeals has held that it is. While this Court is not bound to follow *Nipper,* the lengthy history of this litigation, including the proximity of the trial on remand to Montana's 2002 election, and the fact that Montana's Districting and Apportionment Commission is in the midst of developing a redistricting plan based on the 2000 census, persuades the Court that it is here appropriate to address the arguments regarding remedy raised by the parties on remand.

Defendants argue that even if vote dilution is found to exist in this case, it is the result of population inequalities caused by naturally-occurring demographic changes in Montana over the past decade. In particular, Defendants cite the extensive population growth in western Montana, and the relatively smaller loss of population in certain counties in eastern and central Montana. Moreover, Defendants maintain that because Plaintiffs have not alleged an equal protection claim, they lack standing to seek an immediate redistricting of Lake and Glacier Counties based upon such naturally-occurring population inequalities. Defendants stress that disturbing existing districting boundaries would upset election machinery for the 2002 elections which is already in full swing. In particular, Defendants argue that such last-

minute tampering with the current districting scheme would in many cases require voters to change precincts and polling places and that, given the rural nature of much of Montana, would create substantial difficulty and confusion for voters as well as potential candidates. Finally, Defendants insist that federal interference during an ongoing state election cycle is not warranted as long as Montana is proceeding in good faith to accomplish decennial redistricting though Montana's 2002 Districting and Apportionment Commission.

Plaintiffs do not specifically respond to Defendants' argument that the existence of a viable remedy is a necessary element for finding a violation of § 2 of the Voting Rights Act, but insist that they are entitled to an immediate and complete remedy where a violation of § 2 is found to exist. Moreover, Plaintiffs maintain that proposed redistricting plans for the areas at ***1017** issue in this case offered by Plaintiffs and Defendants demonstrate that existing malapportionment can be remedied in the areas of Lake County and Glacier County. In sum, Plaintiffs argue that Montana has a duty to reapportion in Lake and Glacier Counties to remedy any vote dilution that exists, and that if the state fails to do so, the Court should impose a redistricting remedy on the State of Montana.

The United States Supreme Court has made it clear that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds v. Sims,* 377 U.S. 533, 586, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).[6] The Court in *Reynolds* did not

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6. Plaintiffs cite *Dickinson v. Indiana State Election Bd.,* 933 F.2d 497, 502 (7th Cir.1991), for the proposition that "the supremacy clause ensures that the Voting Rights Act takes precedence over illegal state apportionments." Plaintiffs' quote from *Dickinson* is not complete, however. The full quote by the Court states: "But the supremacy clause ensures that the Voting Rights Act takes precedence over illegal state apportionments, and in light of the options available to accommodate the General Assembly's contribution, federalism provides no basis for dismissing the lawsuit." *Id.* at 502. The "options available to accommodate the General Assembly's (continued...)

delineate the proper remedial devices which federal courts should utilize in state legislative apportionment cases. However, the Court did note that remedial techniques will "often differ with the circumstances of the challenged apportionment and a variety of local conditions." *Id.* at 585, 84 S.Ct. 1362. Recognizing that it would be an unusual case in which a court would be justified in not taking action to ensure that elections are not conducted under a malapportioned districting plan, the *Reynolds* Court stated:

> However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.

Id. at 585, 84 S.Ct. 1362.[7]

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6. (...continued)
contribution," to which the Court refers, include the option that "if a violation of the Voting Rights Act were found ... the General Assembly should be given the first opportunity to correct the deficiency through reapportionment." *Id.* at 501, n. 4. Other cases cited by Plaintiffs all refer to factual scenarios where the district courts ordered voting on a district level despite state law provisions that voting be at-large. (Post-Trial Reply at 27, citing *Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982), *Windy Boy v. County of Big Horn,* 647 F.Supp. 1002 (D.Mont.1986), and *Cuthair v. Montezuma-Cortez, Colorado Sch. Dist.,* 7 F.Supp.2d 1152 (D.Col.1998)). In contrast, this case concerns redistricting because of malapportionment.

7. In *French v. Boner,* a federal district court in Tennessee granted a motion for summary judgment against plaintiffs because there was no equal protection violation, though the districts were malapportioned. 786 F.Supp. 1328, 1333 (M.D.Tenn.1992), *aff'd by French v. Boner,* 963 F.2d 890 (6th Cir.), *cert. denied by French v. Metropolitan Gov. of Nashville and Davidson County, Tenn.,* 506 U.S. 954, 113 S.Ct. 411, 121 L.Ed.2d 335. The court noted that there was no dispute about malapportionment--the districting scheme which was in place as a result of the 1980 census resulted in malapportionment given the results of the 1990 census. *Id.* at 1329. However, the court stated "[t]he 'reasonably conceived plan' of decennial reapportionment is, of itself, sufficient to guarantee the constitutionality of the councilmanic elections held August 1, 1991." *Id.* at 1331 (citing (continued...)

The uncontradicted evidence adduced at trial supports Defendants' argument that ***1018** the 2002 Montana election cycle is in "full swing." Candidates for offices throughout the state begin announcing their candidacy in January 2002, and commence the process of contacting voters in their districts, compiling voter mailing lists and outlining campaign strategies. The deadline for Montana precinct changes is February 24, 2002, and the deadline for announcing candidacy is March 21, 2002. In preparation for those deadlines, the office of the Montana Secretary of State is in the midst of responding to questions about voter district boundaries and providing voter mailing lists to potential candidates. Testimony from the Deputy for Elections for the Montana Secretary of State establishes that one state referendum regarding the state deregulation of energy has already been qualified for the 2002 election. This means that the petition to place the referendum on the ballot has been signed and certified as representing 5% of the voters in 34 Montana House Districts. Changes in Montana House District boundaries, wherever they occur, would likely call into question this particular ballot measure.

The Court finds that potential candidates for office would be disadvantaged by any short-term change in district boundaries as they would not know which district they could run in, nor would they have timely access to voter registration information because the Montana county clerks

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7. (...continued)
Reynolds, 377 U.S. at 583, 84 S.Ct. 1362).
Similarly, in *Fairley v. Forrest County,* African American voters alleged violations of sections 2 and 5 of the Voting Rights Act, of the Fourteenth and Fifteenth Amendments of the United States Constitution, and of the one-man, one-vote principle generally. 814 F.Supp. 1327 (S.D.Miss.1993). The Court denied the plaintiffs' request for a special election because of malapportionment in-between times of decennial redistricting:

> One election every 20 years (1971, 1991, 2001[sic], etc.) will be held so close to the taking of the decennial census that decision makers acting in good faith may be unable to devise a constitutionally-acceptable reapportionment in time for the regularly scheduled elections. Does that mean that the Constitution requires the holding of special elections in every state in which this occurs once every 20 years? This Court thinks not.

Id. at 1343.

and recorders would first have to redraw precinct boundaries and reassign precinct numbers to voters. Similarly, the ability of Montana voters in the redistricted areas to cast a vote would be impacted by changes in precincts and polling places which, according to the testimony adduced at trial, can pose a significant problem in the smaller and more rural counties of Montana.

The testimony and expert report of Susan Byorth Fox, legislative research analyst for the 2000 Montana Districting and Apportionment Commission, establishes that the Commission is in the midst of planning meetings. Indeed, the Commission has commenced a schedule of sixteen regional public hearings throughout the State to prepare a redistricting plan based upon the 2000 census which can be filed with the Secretary of State for consideration by Montana's legislature by January 2003 in accord with Montana's Constitution. *Mont. Const. Art. V, § 14(4).*

The work of the Commission is a deliberative process and necessarily so. No attempt to correct malapportionment can ignore the fundamental "one person, one vote" goal announced by the United States Supreme Court in *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Balancing the need for legislative independence and judicial review, the Supreme Court has held court- ordered reapportionment plans to a high standard of review:

> [U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature ... must ordinarily achieve the goal of population equality with little more than de minimis variation. Where important and significant state considerations rationally mandate departure from these standards, it ***1019** is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

Chapman v. Meier, 420 U.S. 1, 26-27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). *See also Connor v. Finch,* 431 U.S. 407, 414, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) ("[I]n two important respects a court will be held to stricter standards in accomplishing its task than will a state legislature: '(U)nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of

multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than de minimis variation.' *Chapman v. Meier,* 420 U.S. at 26-27, 95 S.Ct. at 766."). Any reapportionment plan ordered by this Court would need to follow the *Chapman* mandate, "achiev[ing] the goal of population equality with little more than de minimis variation." *Id.*

Notwithstanding Plaintiffs' arguments that a redistricting of the districts at issue can be achieved in accord with Plan E (submitted as Appendix 2a to Plaintiffs' Reply Memorandum filed December 27, 2001), Plaintiffs have failed to demonstrate that a court-ordered remedy to address alleged vote dilution would not violate the principals of "one person, one vote" throughout other legislative districts in Montana. That is precisely the task of the 2002 Montana Districting and Apportionment Commission and Montana legislature to be accomplished over the next twelve months. Legitimate state electoral policy which allows the Montana Districting and Apportionment Commission to accomplish its tasks every ten years in a comprehensive and coherent fashion is designed to preserve the orderly administration of elections and to encourage the highest possible participation by the electorate and potential candidates. Given the particular timing and demographic dynamics of Montana, any action by this Court to compel partial redistricting would impair those legitimate state purposes.

Plaintiffs' reliance on the recent decision in *Alden v. Board of County Comm'rs,* CV 99-148-BLG-DWM (D. Mont. filed May 10, 2000) (Pls' Post-Trial Br., Ex. 3a), for the proposition that redistricting should not await the completion of Montana's 2002 redistricting plan is also misplaced. The situation in *Alden* is clearly distinguishable from the case now before the Court. Notably, in *Alden,* defendants stipulated to the fact that redistricting was appropriate. Their argument was limited to contesting the appropriate remedy instituted by the court based upon 1990 census figures, because the results of the 2000 census were not yet available. In ruling that short-term redistricting should be effected based upon 1990 census figures, the court reasoned that the defendants in *Alden* "had not produced any facts to indicate that the 1990 census is so inadequate that a

remedy based on it is doomed to failure." *Id.* at 5.

The *Alden* action, however, was filed in 1999 to address proposed remedies for an election in 2002 for Rosebud County's conceded violation of § 2 of the Voting Rights Act. The court imposed a remedy with respect to Rosebud County Commissioner Districts based upon 10-year-old census figures from 1990. Here, by comparison, Plaintiffs brought this action in 1996 alleging § 2 violations based upon the 1992 Montana redistricting plan which was also based on the 1990 census. Here, the redistricting plan was adopted by the Montana legislature in 1993 and was in effect for less than four years when the suit was commenced. Moreover, there is no stipulation by the parties here, as there was in *Alden,* that redistricting is appropriate. Given the stipulation in *Alden,* the court was not required to consider separation of powers issues nor federalism concerns, nor did the *Alden* court have to confront the ***1020** impact its redistricting order within Rosebud County would have through the balance of the State of Montana.

The Court concludes that without regard to whether the availability of a constitutionally acceptable remedy is deemed an essential element of a § 2 claim, given the particular circumstances of this case, it is an appropriate factor to be weighed in the § 2 totality of circumstances inquiry. Having done so, and for the reasons discussed above, the Court finds that this is the "unusual case" in which a viable short-term remedy is not available. The Court's conclusion in this regard is reinforced by the very real prospect that comprehensive and long-term relief designed to address vote dilution throughout the State of Montana is in the offing within a year under the auspices of the Montana Districting and Apportionment Commission, and further by the Court's finding that no vote dilution has been demonstrated in the particular legislative Districts at issue.

CONCLUSION

Therefore, for the reasons set forth herein, the Court concludes that Judgment is appropriately entered in favor of Defendants with respect to Plaintiffs' § 2 voting rights claim remanded for further proceedings by the United States Court

of Appeals for the Ninth Circuit.

Earl OLD PERSON; Carol Juneau; Bill Whitehead; Herman Red Elk; Ronald Williams; Margaret Campbell; Andrea Main; Donald Meyers; Joseph MacDonald; Jeannine Padilla, Plaintiffs-Appellants,

v.

Mike COONEY, Secretary of State for the State of Montana; Marc Racicot, Governor for the State of Montana, Defendants-Appellees.

No. 98-36157.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 9, 1999
Filed Oct. 27, 2000

American Indian voters sued Governor and Secretary of State of Montana, alleging that 1992 redistricting plan for State House of Representatives and Senate diluted voting strength of American Indians, and was adopted with discriminatory purpose, violating Voting Rights Act. Following bench trial, the United States District Court for the District of Montana, Paul G. Hatfield, J., entered judgment for Governor and Secretary. Voters appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) white majority voted sufficiently as bloc to enable it usually to defeat American Indians' preferred candidates for Montana House of Representatives and Senate, thus satisfying third *Gingles* factor for determining whether plan diluted American Indians' votes; (2) no proportionality existed that would weigh against finding that plan diluted votes of American Indians; and (3) District Court did not clearly err in finding that plan was not adopted with discriminatory purpose.

Reversed and remanded.

***1117** Laughlin McDonald, American Civil Liberties Union Foundation, Inc., Atlanta, Georgia, for the plaintiffs-

appellants.

Sarah A. Bond, Assistant Attorney General, Helena, Montana, for the defendants-appellees.

Appeal from the United States District Court for the District of Montana; Paul G. Hatfield, District Judge, Presiding. D.C. No. CV-96-00004-PGH.

Before: CANBY, BRUNETTI, and O'SCANNLAIN, Circuit Judges.

CANBY, Circuit Judge:

Eleven American Indian plaintiffs appeal the district court's judgment in favor of the defendants, the Governor and Secretary of State of Montana. The plaintiffs contend that the 1992 redistricting plan for Montana's State House of Representatives and Senate dilutes the voting strength of American Indians in violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Plaintiffs further urge that Montana's Districting and Apportionment Commission adopted the 1992 redistricting plan with a discriminatory purpose, an action that would also violate § 2 of the Voting Rights Act.

Following a bench trial, the district court rejected both of plaintiffs' claims. We agree with the district court that there was insufficient evidence of discriminatory purpose on the part of Commission members in adopting the plan, and affirm the court's ruling on that claim. We conclude, however, that the district court's finding that the 1992 redistricting plan did not dilute the voting strength of American Indians was based upon two errors that require its reversal. First, the district court erred in relying in part on the electoral success of Indian candidates in majority-Indian House Districts when it concluded that white bloc voting in majority-white House Districts was not legally significant. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct.

2752, 92 L.Ed.2d 25 (1986).[1] Second, the district court erred in concluding that, under Montana's 1992 redistricting plan, American Indians were proportionally represented. Because these two errors contributed to the district court's ultimate finding of no dilution, we reverse the district court's judgment and remand for further proceedings. In so ruling, we do not decide the ultimate question whether, in light of the totality of the circumstances, vote dilution has occurred; that is, whether under the 1992 redistricting plan American Indians in Montana have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see Johnson v. De Grandy*, 512 U.S. 997, 1013-14, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). We leave that finding of fact to be made in the first instance by the district court, after correction of the two noted errors.

FACTUAL BACKGROUND

A. *Demographics*

American Indians comprise approximately 6% of the total population of the State of Montana, according to the 1990 federal census. But the Indian population is relatively young, and comprises only 4.8% of the state's voting age population. ***1118** Montana's American Indian population is also growing more quickly than the State's population as a whole. Between 1980 and 1990, the total population of the State increased by 1.6%, but the American Indian population of the state increased by 27.9%.

Montana's House of Representatives consists of 100 single member districts. Each member of the House serves for a two-year term. The Montana Senate consists of 50 single member districts; each Senate district is composed of

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1. For convenience, we refer to a House District with a majority American Indian voting age population as a "majority-Indian district." Similarly, we refer to a House District with a majority-white voting age population as a "majority-white district." We refer more generally to a jurisdiction with a voting age population, the majority of which is a minority within the meaning of the Voting Rights Act, as a "majority- minority district."

two adjoining House districts. Members of the Senate are elected for four- year terms, with half of the Senate seats up for election every two years.

Under the redistricting plan adopted in 1982, Indians comprised a majority of the voting age population in 1 of the 100 House Districts. That district included the Blackfeet Reservation in Glacier County in the northwest part of the state. Indians did not represent a majority of the voting age population in any of the 50 Senate districts. By 1990, these demographics had changed with the growth of the Indian population. The 1990 census revealed that American Indians comprised a majority of the voting age population in 4 of 100 House districts and 1 of 50 Senate districts.

B. *Montana's 1992 Redistricting Plan*

Since 1972, Montana's Constitution has granted the exclusive power to adopt a redistricting plan to a five-member Districting and Apportionment Commission. Although the Montana legislature can make recommendations to the Commission, it has no direct power over the geographic composition of legislative districts. The Commission itself is reconstituted every ten years in advance of the federal census. Commission members may not be public officials, although four of the five are appointed by majority and minority leaders of each house of the state legislature. The four Commission members select the fifth member.

The federal census in 1990 revealed that population changes in Montana between 1980 and 1990 had caused some legislative districts in Montana to become malapportioned, and potentially violative of the one-person one-vote requirement embodied in the Fourteenth Amendment. The 1992 Districting and Apportionment Commission therefore was required to draw a new redistricting plan. None of the five Commission members selected was an American Indian.

The Commission held twelve regional public hearings beginning on April 3, 1992. Nine of these regional hearings were preceded by planning meetings that were open to the public. All of these hearings and meetings were recorded on

audio tape; portions of these tapes were summarized or transcribed in the official minutes of the Commission. Statements made by Commissioners at these hearings and meetings form the basis for plaintiffs' claim that Commission members acted with a discriminatory purpose. American Indians appearing before the Commission presented alternative districting plans. One of these plans, referred to as the "Blackfeet-Flathead Plan," contained an alternative districting proposal for the four challenged House districts that are the subject of this appeal.

After submitting its redistricting plan to the legislature for comment, the Commission filed its statewide redistricting plan with the Secretary of State on February 24, 1993. The plan (which we, like the district court, will continue to refer to as the "1992 redistricting plan") then became law, and the Commission dissolved.

The 1992 redistricting plan increased the number of majority-Indian House Districts ("HDs") from four to five (i.e., HDs 5, 6, 85, 92, and 98). *See* Appendix I ("1994 Montana Legislative Districts" appearing in Appellee's Supplemental Excerpts of Record [**at 20**]). One of these majority-Indian districts, House District 85, is included in the four districts challenged on appeal. House District 85 contains the Blackfeet Indian Reservation in Glacier County. Of the five majority-Indian districts in the state plan, HD 85 has by ***1119** far the largest Indian voting age population: 66% for HD 85, as opposed to 55% in HD 98, 53% in HD 6, 52% in HD 92, and 50% in HD 5.

Table 1
House Districts by Percentage Indian Voting Age Population ("VAP")
(* indicates district lines are challenged on appeal)

House District	Percentage Indian VAP
*HD 85	66%
HD 98	55%

HD 6	53%
HD 92	52%
HD 5	50%
*HD 73	28%
*HD 86	19%
*HD 74	14%
All others	less than 11%

Of the remaining House Districts in the state, only three have an Indian voting age population of 11% or more: 28% in HD 73, 19% in HD 86, and 14% in HD 74. These three districts, HDs 73, 86 and 74, are the remaining three House Districts whose boundaries are challenged on appeal.

The 1992 redistricting plan contains one majority-Indian Senate District ("SD"). That district, SD 3, is located in the southeast portion of the state, and contains an Indian voting age population of 51%. SD 3 is not a subject of this appeal.

STANDARD OF REVIEW

We review for clear error the district court's findings of fact, including its ultimate finding whether, in the totality of circumstances, vote dilution exists in violation of § 2. *Thornburg v. Gingles,* 478 U.S. 30, 78- 79, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *Smith v. Salt River Project Agric. Improvement & Power Dist.,* 109 F.3d 586, 591 (9th Cir.1997). We retain the power, however, " 'to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' " *Gingles,* 478 U.S. at 79, 106 S.Ct. 2752; *Salt River,* 109 F.3d at 591.

VOTE DILUTION

Before addressing the errors underlying the finding of no vote dilution, we address a threshold issue arising from the scope of appeal. At trial, plaintiffs alleged vote dilution in two separate geographic areas of the state, each involving four House Districts. The district court found no vote dilution in either area. On appeal, plaintiffs challenge the district court's finding only with regard to the first area, which includes HDs 73, 74, 85 and 86 in the northwest part of the state; plaintiffs offered the "Blackfeet- Flathead Plan" as an alternative to the 1992 redistricting plan for this area. Plaintiffs have not appealed the district court's finding with regard to the second area, which includes HDs 91, 92, 97 and 98 in the northeast part of the state; plaintiffs offered the "Rocky Boy-Fort Belknap-Fort Peck Plan" as a substitute for this region.[2]

The district court analyzed the evidence of vote dilution in the eight challenged districts taken together.[3] Because the

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2. Plaintiffs originally challenged the State's redistricting plan in a third area, the region encompassing the Crow and Northern Cheyenne Reservations in southeast Montana. Plaintiffs dismissed this basis for their claim before trial.

3. The district court was careful to ensure that statistical data relating to racially polarized voting was not aggregated across districts, as the Supreme Court has noted must not be done in a § 2 case. *See Thornburg v. Gingles,* 478 U.S. 30, 59 n. 28, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). That is, each BERA (regression) analysis considered as evidence in this opinion, or the district court's order, was performed only on voting data specific to the district in question. *See* Part B *infra* (discussion of BERA analyses). These analyses did not include data from other districts where voting behavior might have different explanations.

But in calculating the incidence of bloc voting by the white majority, as § 2 requires, the district court considered the incidence of white bloc voting as a unitary proportion across all eight districts challenged at trial. For example, the district court calculated the number of times that 60% or more of white voters combined to defeat the Indian-preferred candidate in the eight districts at trial as a percentage of the total number of relevant contests in the same eight districts. This percentage, of course, will vary depending on whether the ratio includes election contests from all eight districts, or only from four. The numerical value of the percentage is important because in a successful claim of vote dilution, white bloc voting

(continued...)

geographic scope challenged on appeal is narrower than that challenged at trial, the ***1120** question arises whether we review the district court's analysis of vote dilution in the eight districts challenged at trial, or review only the record evidence of vote dilution relevant to the four districts challenged on appeal.[4] We conclude that we need not decide this question; under either approach, we conclude that the district court erred in two of its subsidiary findings. To reach this conclusion, we address the evidence from both points of view.

To establish a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the American Indian plaintiffs must show "that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [American Indians, a 'language minority group' protected by the Act under 42 U.S.C. § 1973aa- 1a(e)] in that [their] members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As the district court properly understood, the § 2 inquiry requires a two-step process. First, plaintiffs must show three existing threshold conditions (known as the *Gingles* factors): (1) the population of American Indians "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) American Indians are "politically cohesive"; and (3) the "white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, ... usually to defeat the minority's preferred candidate." *Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (multi-member district); *see Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) (single-member districts).

Second, if all three *Gingles* factors have been established,

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3. (...continued)
must be sufficient "usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752.

4. Our analysis of evidence relating to the four districts challenged on appeal is aided by findings by the district court, which we discuss below, and which are not disputed by the parties.

the court must decide the ultimate question of vote dilution; it must determine whether, "on the totality of circumstances," American Indians have been denied an equal opportunity to "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As part of this inquiry, the court considers a non-exhaustive list of factors set out in the legislative history to the Voting Rights Act as well as cases interpreting it. *See Johnson v. De Grandy,* 512 U.S. 997, 1010 n. 9, 1013- 14, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). One of these factors, "proportionality," relates the number of majority-Indian districts to the American Indians' share of the relevant population. *Id.* at 1014 n. 11, 114 S.Ct. 2647. [5]

We turn now to the vote dilution analysis.

A. *Gingles One and Two: Compactness and Political Cohesiveness*

As an alternative to the legislative boundaries drawn by the State for HDs 73, ***1121** 74, 85 and 86, plaintiffs offered the Blackfeet-Flathead Plan. That plan would create a new majority-Indian House District by enlarging HD 73. *See* Appendix II ("House District 1 and 2 for Flathead, Lake, Glacier and Pondera Counties" appearing in Appellee's Supplemental Excerpts of Record [**at 11**]). It would also create a new majority-Indian Senate District by reconfiguring the existing HD 85, already a majority-Indian district, and combining it with enlarged HD 73.[6]

Under the Blackfeet-Flathead Plan, the Indian voting age population of HD 73 would increase from 28% under the

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5. Proportionality is distinct from proportional representation. Proportionality relates to "the political or electoral power of minority voters," while proportional representation refers to the electoral success of minority candidates. *Id.*

6. In the diagram of the Blackfeet-Flathead Plan (Appendix II), HD 2 on the diagram represents the proposed reconfiguration of HD 85 in the 1992 redistricting plan; HD 1 on the diagram represents the proposed reconfiguration of HD 73. HD 1 and HD 2 on the diagram, taken together, represent the proposed new Senate District.

1992 redistricting plan to 53% under the proposed plan. The Indian voting age population in HD 85 would decline from 66% to 57%. American Indians would represent 55% of the voting age population in the proposed combined Senate District.

The district court found that the population of American Indians residing on the Blackfeet and Flathead Indian Reservations is sufficiently large and geographically compact to constitute a majority in an additional single member House District and an additional single member Senate District. The district court also found that the proposed House and Senate Districts in the Blackfeet-Flathead Plan are reasonably compact and regular, and that their shape is not materially different from that of other districts adopted by the 1992 Commission. The parties do not dispute these findings.

The State does claim, however, that the majority-Indian districts proposed by plaintiffs would be insufficient to confer effective voting power. The evidence proffered by the State does not support its claim, however, even were we to conclude that *Gingles* required such a finding. *See Gingles,* 478 U.S. at 50, 106 S.Ct. 2752 (requiring only a "majority in a single-member district."). *Badillo v. City of Stockton,* 956 F.2d 884, 890-91 (9th Cir.1992), on which the State relies, does not address this factor. The district court's finding was not clearly erroneous. The first factor of the *Gingles* analysis is therefore satisfied. *See Gingles,* 478 U.S. at 50, 106 S.Ct. 2752.

The second *Gingles* factor is also satisfied. American Indian voters are "politically cohesive" if they have "expressed clear political preferences that are distinct from those of the majority." *Gomez v. City of Watsonville,* 863 F.2d 1407, 1415 (9th Cir.1988); *see also Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. The State's expert, Dr. Jeffrey Zax, presented evidence that showed American Indians were politically cohesive in more than 70% of the general elections, retention elections and ballot issue elections that he examined in the eight House Districts. Plaintiffs' expert, Dr. Joe Floyd, presented evidence that American Indians were politically cohesive in more than 80% of the elections that he examined in which a white candidate opposed an

American Indian candidate for a position in State, federal or county government.[7] The district court had no need to inquire more deeply into these statistical findings. The parties stipulated that American Indian voters were politically cohesive in all eight districts challenged at trial. The parties do not challenge this stipulation as it applies to the four districts challenged on appeal.

B. *Gingles Three: White Bloc Voting*

Under the third *Gingles* factor, the court must determine whether the "white ***1122** majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, ... usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. In such a case, white bloc voting is said to be "legally significant." *Id.* at 55-56, 106 S.Ct. 2752. The district court followed a two-step process for ascertaining the existence of white bloc voting in a particular contest: the process requires the court (1) to determine the candidate preferred by Indian voters; and (2) to determine whether whites voted as a bloc to defeat the Indian-preferred candidate. We previously employed this approach in *Ruiz v. City of Santa Maria,* 160 F.3d 543, 550-54 (9th Cir.1998), *cert. denied,* 527 U.S. 1022, 119 S.Ct. 2367, 144 L.Ed.2d 771 (1999), and *Valladolid v. City of National City,* 976 F.2d 1293, 1296-97 (9th Cir.1992).

The district court applied this two-step process and found that white majority voters did not usually (i.e., more than half of the time) vote to defeat the preferred candidate of Indian voters. But this finding rests on an error of method. In calculating the incidence of white bloc voting, the district court drew no distinction between jurisdictions in which Indian voters constitute a majority of the voting age population, and those jurisdictions in which white voters

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7. Floyd's data suffered from a methodological infirmity in that it was aggregated across challenged and non-challenged jurisdictions. *See Gingles,* 478 U.S. at 59 n. 28, 106 S.Ct. 2752 ("When considering several separate vote dilution claims in a single case, courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district.").

were in the majority. The third *Gingles* factor directs the court's inquiry to those jurisdictions where there is a "white majority." *Gingles,* 478 U.S. at 50, 106 S.Ct. 2752. This issue did not arise in *Gingles,* of course, because there were no majority black jurisdictions in the challenged plan. *Johnson v. De Grandy,* decided eight years later, is more instructive. There the Court faced a post-*Gingles* phenomenon, a § 2 challenge to a plan that already included some majority-minority districts. The Court described this kind of challenge as a claim of "partial submergence; not the chance for some electoral success in place of none, but the chance for more success in place of some." *De Grandy,* 512 U.S. at 1012-13, 114 S.Ct. 2647.

In *De Grandy,* the Court ratified the district court's conclusion that the third *Gingles* factor had been satisfied where there was "a tendency of non-Hispanic whites to vote as a bloc to bar minority groups from electing their chosen candidates *except in a district where a given minority makes up a voting majority.*" *Id.* at 1003-04, 114 S.Ct. 2647 (emphasis added) (citing *De Grandy v. Wetherell,* 815 F.Supp. 1550, 1572 (N.D.Fla.1992), *aff'd in part and rev'd in part sub nom. Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)); *see also id.* at 1009, 114 S.Ct. 2647. Following *De Grandy,* we consider Indian electoral success in majority-Indian districts only in the inquiry into the totality of the circumstances-- particularly proportionality and proportional representation. *See id.* at 1012-15, 114 S.Ct. 2647. To do otherwise would permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-Indian districts. Such an approach would be antithetical to the directive in *Gingles* that legally significant white bloc voting be determined on a fact-specific "district to district" basis. *Gingles,* 478 U.S. at 56, 106 S.Ct. 2752.

The district court also considered white bloc voting to be probative only if the white-preferred candidate won with a minimum of 60% of the white vote. Plaintiffs contest this standard, and argue that white bloc voting is per se probative if it is sufficient to defeat the Indian-preferred candidate. *See id.* (relevant white bloc voting varies according to a number of factors, including "the percentage of registered

voters in the district who are members of the minority group"). We assume, without deciding, that the district court employed the proper threshold. Even under this more demanding standard, the third *Gingles* factor is satisfied.

1. *Evidence of white bloc voting*

At trial, the parties presented statistical evidence of racial polarization and bloc voting ***1123** by white voters in 1994 and 1996, the two election years prior to discovery in which the 1992 redistricting plan was in effect.[8] This evidence addressed racial polarization and white bloc voting in the eight districts challenged at trial, including the four districts challenged on appeal (the four districts affected by the Blackfeet-Flathead Plan). We conclude this evidence showed legally significant white bloc voting.

The district court relied upon the statistical evidence presented by the State's expert witness, Dr. Zax. Zax analyzed precinct election returns using a standard statistical technique known as bivariate ecological regression analysis ("BERA"). The BERA analyses compared the votes a candidate received in an election with the racial composition of the electorate, and produced estimates of the voting behavior of American Indian and white voters. The analyses did not determine the voting behavior of individual voters or determine the exact behavior of a group of voters. The BERA analyses performed by Zax were independent for each district; there was no aggregation of data across districts.

Zax produced district-specific results for the eight districts challenged at trial (including the four districts challenged on appeal). Zax first determined the number of Indians and whites of voting age in the relevant election precincts. He did so by examining the 1990 census data on racial composition of the population by census block, then overlaying a precinct map on top of the census bloc maps,

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8. "Racial polarization" refers to the combined effect of the second and third *Gingles* factors, that is, political cohesion by the American Indian minority and white bloc voting by the white majority. *Ruiz,* 160 F.3d at 551 (citing *Gingles,* 478 U.S. at 56, 106 S.Ct. 2752).

and apportioning the racial population data accordingly.[9] When the precinct boundaries and census bloc boundaries were not coterminous, Zax assumed the population was distributed uniformly. Once the racial composition of the election precincts was determined, Zax ran the BERA analysis to estimate minority and white voting percentages by candidate and by election contest.

Zax's BERA analysis produced district-specific results for 258 election contests in the eight districts challenged at trial (including the 133 contests in the four districts challenged on appeal). These contests included general elections, ballot initiatives and retention elections[10] at the state and federal level. Zax considered an election between two candidates to be an individual "race," and voting with respect to a "race" in a given district was a "contest." Thus, a "race" taking place in all eight districts (e.g., the 1996 presidential election) was considered to be eight "contests."

Zax also performed supplemental BERA analyses on twelve primary election and fifteen general election contests occurring in the eight districts challenged at trial in which a white candidate opposed an Indian candidate. He did so by performing a new BERA analysis on data compiled by plaintiffs' expert Floyd. Some of these contests were also included in the general elections previously analyzed by Zax.[11]

2. *Election contests between Indian and white candidates*

Elections between white and minority candidates are the

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9. The U.S. Census reports data by a geographic designation known as a "bloc." This data includes racial and ethnic composition of the population. Montana maintains precinct maps, which define where a given population votes, but which do not include data on the racial and ethnic composition of the population.

10. Retention elections in the eight districts challenged at trial asked voters to cast a ballot for or against retaining a particular state judge.

11. We refer to these supplemental analyses by Zax only for the purpose of discussing primary election results, which Zax did not address at all in his initial analysis.

most probative in determining the existence of legally significant ***1124** white bloc voting. *See Ruiz,* 160 F.3d at 553-54; *Nipper v. Smith,* 39 F.3d 1494, 1539 (11th Cir.1994). In this case, the Indian (and Indian-preferred) candidate was usually defeated by the white majority voting as a bloc.

In 1994 and 1996, there were 10 election contests in the four challenged House Districts (HDs 73, 74, 85 and 86) in which an Indian candidate opposed a non- Indian candidate for a position in the state or federal government. *See* Table 2.

Table 2
Indian/White Election Contests in HDs 73, 74, 85 and 86

District or County/Percentage Indian voting age population ("VAP")	Year	General or Primary/ Position	White vote for white candi-date	Indian vote for Indian candi-date	Whether Indian candidate won or lost
HD 73 28% Indian VAP	1996	General State Rep.	65.8%	70.6%	Lost
HD 73 28% Indian VAP	1996	General State Senate	61.4%	69.2%	Lost
HD 73 28% Indian VAP	1996	General U. S. Rep.	65.6%	69.3%	Lost
HD 74 14% Indian VAP	1996	General State Senate	71.4%	96.8%	Lost
HD 74 14% Indian VAP	1996	General U. S. Rep.	66.9%	70.4%	Lost

HD 86 19% Indian VAP	1996	General U. S. Rep.	69.2%	94.4%	Lost
Lake County 18% Indian VAP	1996	Primary U. S. Rep.	54.5%	84.5%	Won (lost general)
HD 85 66% Indian VAP	1994	General State Rep.	84.2%	79.0%	Won
HD 85 66% Indian VAP	1996	General State Rep.	74.2%	98.9%	Won
Glacier County 51% Indian VAP	1996	Primary U. S. Rep.	56.0%	91.9%	Won

Of these 10 contests, there were 7 (6 in HDs 73, 74, and 86 and 1 in Lake County) in which American Indians constituted a minority of the voting age population. In each of these 7 contests, a majority of white and Indian voters preferred a different candidate (i.e., it was a "split-preference" election). In 6 of these 7 elections (86%), the Indian candidate (who was also the Indian-preferred candidate) lost. In each of those 6 losses, over 61% of white voters supported the white candidate.

In 3 of the 10 elections (two in HD 85 and one in Glacier County), American Indians constituted a majority of the voting age population. In each of those contests, whites and Indians preferred a different candidate. In each case, the American Indian (and Indian preferred) candidate won.

If all eight of the districts challenged at trial are considered, the statistics are similar. There were 17 contests between white and Indian candidates subject to BERA analysis, 6 primary and 11 general election contests. Of the

6 contests in majority-Indian jurisdictions, the Indian (and Indian-preferred) candidate won all 6. ***1125** Of the 11 contests in majority- white jurisdictions, the Indian (and Indian-preferred) candidate was defeated in 7 contests (64%) by a white vote in excess of 60%. All 4 of the victories by an Indian candidate in a majority-white jurisdiction were represented by the victory of Democrat Bill Yellowtail in the 1996 Democratic primary for Montana's sole seat in the U.S. House of Representatives. Thus, the contests between white and Indian candidates suggest white bloc voting was legally significant within the meaning of the third *Gingles* factor.

3. *Racially-polarized elections between white candidates*

In 1994 and 1996 there were 51 general election contests held in the four challenged House Districts involving two white candidates. Of these 51 elections, American Indian voters and white voters preferred different candidates in 29 contests (21 in majority-white districts and 8 in majority-Indian districts). In jurisdictions with a majority-white voting age population, the candidate preferred by Indian voters lost 14 of 21 elections (67%); in 11 of those 21 elections (52%) the Indian-preferred candidate was defeated by a white bloc vote in excess of 60%. In jurisdictions with a majority-Indian voting age population, the candidate preferred by Indian voters won all 8 contests.

During the same period, there were 5 white-white election contests for the State House of Representatives or Senate for which BERA analyses were performed. We consider these contests, occurring in the challenged districts and involving the same public office subject to challenge, to be more probative than election contests for other offices. *NAACP v. City of Niagara Falls,* 65 F.3d 1002, 1015 n. 16 (2d Cir.1995). Of these 5, white and Indian voters preferred different candidates in 4 of the contests. *See* Table 3 below.

Table 3
White/White Legislative General Elections in HDs 73, 74, 85 and 86

District or County/ Percentage Indian voting age population ("VAP")	Year	Position	Split-pref.?	White vote for white-preferred candidate	Indian vote for Indian-preferred candidate	Whether Indian candidate won or lost
HD 73 28% Indian VAP	1994	State Rep.	No	-	-	-
HD 74 14% Indian VAP	1994	State Rep.	Yes	77.8%	79.1%	Lost
HD 86 19% Indian VAP	1994	State Senate	Yes	71.2%	87.0%	Lost
HD 85 19% Indian VAP	1996	State Rep.	Yes	75.9%	89.1%	Lost
HD 85 66% Indian VAP	1994	State Senate	Yes	71.7%	88.7%	Won

In districts with a majority-white voting age population (HDs 73, 74 and 86), the candidate preferred by Indian voters lost all 3 split-preference election contests; in each case, white bloc voting exceeded 71%. In the 1 district with a majority-Indian voting age population, the candidate preferred by Indian voters won the sole election contest.

An analysis of white-white elections in all eight of the districts challenged at trial produces similar evidence that white bloc voting usually defeats the Indian-preferred ***1126** candidate. Of the 100 contests analyzed, white and Indian voters preferred different candidates in 50 elections (31 in

majority- white jurisdictions and 19 in majority-Indian jurisdictions). In majority- white districts, the Indian-preferred candidate was defeated 24 of 31 times (77%); more than 60% of white voters voted as a bloc to defeat the Indian- preferred candidate in 17 of those 31 election contests (55%). In majority- Indian districts, the Indian-preferred white candidate won 15 of 19 contests (79%). If only state legislative elections are considered, the Indian-preferred candidate was defeated in all split-preference contests, and in 5 of those 6 instances (83%) by a white bloc voting in excess of 60%. In contrast, the Indian-preferred candidate won both of the elections in a majority-Indian district. Thus, an analysis of racially-polarized white-white contests reveals legally significant white bloc voting as defined by *Gingles.*

The State urges us to consider, as the district court did not, the extent to which a majority of white and Indian voters agreed on candidates in the relevant electoral contests. In *Askew v. City of Rome,* 127 F.3d 1355, 1385 (11th Cir.1997), it was error for the district court to consider only those elections in which black and white voters preferred different candidates. In *Askew,* black candidates (who were also black-preferred) ran in 33 elections. *Id.* at 1381. In 23 elections the white majority preferred the black candidate and the black candidate won all 23 of those contests. *Id.* at 1381, 1385. In the 10 contests in which the white majority did not prefer the black candidate, the black candidate lost. *Id.* at 1385. The district court considered only the 10 split-preference contests to be probative. The Eleventh Circuit disagreed, and held that the excluded 23 contests were probative as well. *Id.*

Askew has no analog here. Of the 17 contests between white and Indian candidates considered by the district court, in both majority-white and majority-Indian jurisdictions, the majority of white voters preferred the white candidate 16 out of 17 times. In the sole remaining contest, the white vote was split 50-50 between the two candidates. It is true that there was more agreement between white and Indian voters when no Indian candidates were in the race. But we have no evidence to suggest that most of these contests that the State claims to evidence racial "agreement" actually touched on

issues of heightened concern to the Indian community. In fact the scant evidence is to the contrary.[12] In addition, none of the contests to which the State points for support are state legislative elections. Without more, we cannot conclude that the district court erred by failing to consider the extent to which white and Indian voters did not have split preferences in white-white contests.

4. *Other elections*

Zax also produced evidence of white bloc voting with respect to ballot initiatives and retention elections. There were 64 ballot initiatives in the four districts challenged on appeal. Of the 64 contests, Indian and white voters preferred different options in 28 contests. In majority-white districts, white voters defeated the Indian-preferred alternative in 16 of 23 contests (70%), but did so by a bloc exceeding 60% of white voters on only 4 of 23 instances (17%). There were 5 contests in majority-Indian districts, and the Indian-preferred alternative was defeated in only one of those instances.

Results were similar if all eight districts challenged at trial are considered. Of the 128 contests, 64 were split-preference elections. White voters defeated the Indian-preferred alternative in 34 of 43 contests (79%), but in only 10 of those 43 instances (23%) did white voters vote by a bloc in excess of 60%.

***1127** Of the 18 retention elections, white and Indian voters did not prefer different alternative in any of those contests.

5. *Gingles three: analysis of white bloc voting*

Considering all this evidence in the aggregate, we conclude that the white majority in the four districts challenged on appeal "votes sufficiently as a bloc to enable it

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12. For example, there were 32 election contests for Supreme Court Clerk, State Auditor or Secretary of State. In none of these did white and Indian voters prefer a different candidate.

... usually to defeat the [American Indians'] preferred candidate." *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. This conclusion holds even if we assume, as did the district court, that at least 60% of the white majority must vote for a candidate to constitute a white bloc. In the contests between white and Indian candidates that are most probative of white bloc voting, the Indian (and Indian-preferred) candidate was "usually" defeated by white bloc voting in majority-white jurisdictions: in 86% of the contests in the four districts challenged on appeal and in 64% of the contests in the eight districts challenged at trial. Similarly, in contests between white candidates in majority-white districts in which white and Indian voters expressed a preference for different candidates, the Indian-preferred candidate was "usually" defeated by white bloc voting: in 52% (four districts) and 55% (eight districts) of the contests analyzed. In state legislative races between white candidates, which are the most probative white-white contests, *see City of Niagara Falls,* 65 F.3d at 1015 n. 16, the Indian-preferred candidate lost 100% of split-preference elections in majority-white districts as a result of white bloc voting in the four districts, and 83% of contests in the eight districts challenged at trial. In no case listed above does the rate at which Indian-preferred candidates are defeated by white bloc voting fall below 50%; in the contests that are most probative of white bloc voting, the percentages are far above that threshold. This evidence is more than sufficient to establish "legally significant" white bloc voting within the meaning of the third *Gingles* factor. *See* 478 U.S. at 55, 106 S.Ct. 2752.

In contrast, Indian and Indian-preferred candidates experienced strong electoral success in majority-Indian jurisdictions. Indian candidates (all of whom were also Indian-preferred) won 100% of the 3 contests in the four challenged districts, and 100% of the 6 contests in the eight districts. Indian-preferred white candidates won all 8 (100%) of the contests in the four districts, and 15 of the 19(79%) contests in the eight districts. As we noted above, the presence of electoral success in majority-Indian jurisdictions does not lessen the significance of white bloc voting in neighboring majority-white jurisdictions.

The State does not accept our standard for determining legally significant white bloc voting. Pointing to *Abrams v. Johnson,* 521 U.S. 74, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997), the State urges that white bloc voting cannot satisfy the third *Gingles* factor when at least 22% to 38% of white voters "cross over" and vote for the minority-preferred candidate. *See id.* at 92-93, 117 S.Ct. 1925. We reject such a bright-line test. As the *Gingles* Court observed, "there is no simple doctrinal test for the existence of legally significant racial bloc voting." 478 U.S. at 58, 106 S.Ct. 2752. The reason--"the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances." *Id.* at 57-58, 106 S.Ct. 2752; *see also De Grandy,* 512 U.S. at 1011, 114 S.Ct. 2647. The *Gingles* Court itself invalidated multi-member districts in which white cross-over voting for black candidates ranged from 8% to 50% in primary elections, and from 28% to 49% in general elections. 478 U.S. at 59, 106 S.Ct. 2752.

Nor do the "factual circumstances" of *Abrams* suggest that such a standard is applicable here. In *Abrams* the district court found that black and black-preferred candidates "received significant--occasionally overwhelming-- support from both black and white voters." *Abrams,* 521 U.S. at 92, 117 S.Ct. 1925. White cross-over voting was so significant that two black incumbents won re-election to Congress ***1128** in majority-white districts. *Id.* at 93, 117 S.Ct. 1925. No such facts--or findings--are present here. We decline to apply the threshold urged by the State, even on a fact-specific basis.

Finally, the State offers an alternative rationale, which we reject, for the district court's finding on white bloc voting. Losses by Indian candidates, contends the State, can fairly be ascribed to partisan politics and not race, at least where Democratic Indian candidates lose in majority Republican districts. A plurality of the Supreme Court rejected this argument in *Gingles. See Gingles,* 478 U.S. at 63-65, 106 S.Ct. 2752 (plurality opinion with respect to part III.C); *see also Sanchez v. Colorado,* 97 F.3d 1303, 1315-16 (10th Cir.1996); *Collins v. City of Norfolk,* 816 F.2d 932, 935 (4th Cir.1987). In any event, we need not address this question

because the evidence on the record does not support the State's argument. Indian (Indian-preferred) candidates generally received a lower percentage of white votes than did white Indian-preferred candidates in the same district. We therefore decline to attribute white bloc voting in the four challenged districts to mere partisan politics.

C. *Totality of the circumstances*

Having determined that the plaintiffs have satisfied the three *Gingles* factors, we now address the question whether the district court correctly analyzed the factors relevant to its decision that, under the "totality of the circumstances," the 1992 redistricting plan did not impermissibly impair the ability of American Indians to elect their preferred representatives. *See Gingles,* 478 U.S. at 43-46, 106 S.Ct. 2752; *Ruiz,* 160 F.3d at 550. We conclude that the district court erred with regard to the factor of proportionality. Because that error may have affected its ultimate determination of no dilution, we reverse the district court's judgment and remand for further proceedings.

In 1982 the Senate Judiciary Committee produced a list of factors (the "Senate factors") that a court should consider in examining the totality of the circumstances.[13] This list is

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13. The Senate factors include:
1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the
(continued...)

exemplary, and not exhaustive, and " 'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.' " *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752. The most important of the Senate factors are racial polarization, "the 'extent to which voting in the elections of the state or political subdivision is racially polarized,' " and proportional representation, "the 'extent to which [American Indians] have been elected to public office in the jurisdiction.' " ***1129** *Id.* at 48 n. 15, 106 S.Ct. 2752. A third important factor is "proportionality," the relation of the number of majority-Indian voting districts to the American Indians' share of the relevant population. *De Grandy,* 512 U.S. at 1014 n. 11, 114 S.Ct. 2647. These factors are not to be applied woodenly; as the Senate Judiciary Committee noted, and the Supreme Court has reiterated, " 'the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality,' and on a 'functional' view of the political process." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752 (quoting S.Rep. No. 97-417, at 30 & n. 120 (1982) ("Senate Report"), *reprinted in* 1982 U.S.C.C.A.N. 177, 208) (internal quotation marks and citation omitted).

The district court found that some of the Senate factors favored a finding of a § 2 violation. There was a history of discrimination by the federal government and the State of Montana from the 1860s until as recently as 1971. American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the

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13. (...continued)
minority group have been elected to public office in the jurisdiction. Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: [8] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and 9] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (footnotes omitted); *see also Gingles,* 478 U.S. at 44-45, 106 S.Ct. 2752.

political process. These two findings are not contested by the State. The district court also noted that most of the elections in the eight challenged districts involving an American Indian and a white candidate were racially polarized. Finally, it noted that in at least two recent elections in Lake County, which is within the four districts challenged on appeal, there had been overt or subtle racial appeals.

The district court also found evidence that, it concluded, supported a contrary finding. First, Montana does not have unreasonably large election districts, anti-single shot provisions, or other voting practices that enhance the opportunity for discrimination against Indian voters. Second, Montana does not have a candidate slating process. Third, Montana state officials, said the court, are "generally responsive" to the needs of American Indians.[14] Fourth, the policies underlying the creation of the existing district boundaries were not tenuous. Fifth, the number of American Indians elected to the state legislature was "roughly proportional" to the American Indians' share of the voting age population in Montana.

Finally, with respect to proportionality, the district court found that the number of legislative districts in which American Indians constitute an effective majority is "roughly proportional to the American Indians' respective share of the voting age population in Montana." On the strength of this and all of its other findings, and considering the totality of the circumstances, the district court found no § 2 violation.

The court's last subsidiary finding of proportionality, however, was erroneous.[15] Because the Supreme Court has

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14. This finding of responsiveness of elected officials may be of "limited relevance." *Sanchez,* 97 F.3d at 1325.

15. The district court considered the question of proportionality within the entire state, and not within a geographic subset, for example the eight districts challenged at trial or certain counties within the state. Because the parties do not object to the scope of the district court's inquiry, we need not decide whether the entire state is the proper "frame of reference" for a proportionality finding. *De Grandy,* 512 U.S. at 1021 n. 18, 1022, 114 S.Ct. 2647; *see also Rural West Tenn. African American-Affairs Council v.*

(continued...)

left open the question of whether voting age population or total population should be the measure of proportionality, we consider both proportions. *See De Grandy,* 512 U.S. at 1017 n. 14, 114 S.Ct. 2647. Under the 1992 redistricting plan, 5 of the 100 House Districts (5%) are majority-Indian: this proportion is 104% proportional if the 4.8% Indian voting age population of the state is considered and 83% proportional if the 6% Indian population of the state is considered. We might consider these figures to represent "rough proportionality," ***1130** as the district court found, were it not for the corresponding proportions for the State Senate and state legislature as a whole.[16] The 1992 plan for the State Senate is significantly below proportionality: 1 of 50 Senate districts (2%) is majority-Indian. This proportion is 42% proportional if the 4.8% Indian voting age population of the state is considered, and only 33% proportional if the 6% Indian population is considered. Proportionality in the combined legislature is little better. There are 6 majority-Indian House or Senate Districts out of 150(4%): this proportion is 83% proportional if the 4.8% Indian voting age population of the state is considered, and 67% proportional if the 6% total Indian population of the State is considered. These figures do not permit a finding of proportionality within the meaning of *De Grandy.*[17]

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15. (...continued)
Sundquist, 209 F.3d 835, 843-44 (6th Cir.), *cert. denied,* 531 U.S. 944, 121 S.Ct. 340, 148 L.Ed.2d 273 (2000).

16. Even if the ratio in the State House were considered to constitute "proportionality" in a narrow sense, it would not necessarily preclude a finding of vote dilution. Proportionality is not a "safe harbor." *De Grandy,* 512 U.S. at 1016-21, 114 S.Ct. 2647.

17. The *De Grandy* Court endorsed the district court's finding of proportionality where Hispanics represented a majority in 9 of 18(50%) of House districts located primarily in Dade County, in proportion to a 50% Hispanic voting age population in Dade County. *De Grandy,* 512 U.S. at 1014, 114 S.Ct. 2647. This ratio corresponds to 100% proportionality as calculated above. Similarly, the district court found that Hispanics represented a majority in 9 of 20 House districts (45%) located at least in part in Dade County, in relation to the 47% Hispanic voting age population
(continued...)

We conclude that this error may have affected the district court's ultimate finding that, in the totality of circumstances, there was no dilution of American Indian voting strength. The district court recited several factors favoring each side, indicating that the case is sufficiently close that we cannot know whether or not the district court would have found dilution if it had correctly assessed the factor of proportionality. We therefore reverse the judgment of the district court and remand the matter for further proceedings appropriate to a new determination of the question whether, in the totality of circumstances, American Indian voting strength was diluted by the 1992 redistricting plan, in violation of § 2.

DISCRIMINATORY PURPOSE

Plaintiffs claim in the alternative that Montana's 1992 redistricting plan was adopted with a discriminatory purpose in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973. Consistent with Congress' intent in amending the Voting Rights Act in 1982, we have held that § 2 can be violated not only by adopting an apportionment scheme that has the discriminatory effect of diluting the vote of minority voters protected by the Act, but by adopting an apportionment scheme with the purpose of discriminating against those voters. *See Garza v. County of Los Angeles,* 918 F.2d 763, 766 (9th Cir.1990). The district court found that Montana's 1992 plan had not been adopted with a discriminatory purpose. We conclude that this finding is not clearly erroneous, and we accordingly affirm the district court's ruling.

As the district court understood, the standard for proving discriminatory purpose under § 2 is that set out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). *See Askew v. City of Rome,* 127 F.3d 1355, 1373

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17. (...continued)
in that area. *Id.* This ratio represents 96% proportionality as calculated above.

(11th Cir.1997). Plaintiffs rely on several contemporaneous comments made by Commission members in support of their contention that the district court's findings were clearly erroneous. Although we recognize that some of the Commissioners' comments were inflammatory, a reasonable finder of fact could conclude, as did the district court, that there was no discriminatory purpose in the adoption of the plan. Applying other *Arlington Heights* factors, the district court also ***1131** found that the Commission did not deviate from its established criteria, that the redistricting plan significantly increased majority-Indian districts, and that the plan did not burden American Indians more than whites. After reviewing the complete record before us, we conclude that these findings were not clearly erroneous.

We also reject plaintiffs' claim that the district court misapplied the burden-shifting rule set out in *Hunter v. Underwood,* 471 U.S. 222, 228, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). *Underwood* requires that the burden of proof be shifted to the State only if plaintiffs establish by a preponderance of the evidence that discrimination was a " 'substantial' " or " 'motivating' " factor in the decisional process. *Id.* at 225, 228, 105 S.Ct. 1916. The district court concluded, without clear error, that plaintiffs did not sustain their initial burden of proof. Consequently, no burden shifting was required.

We also reject the plaintiffs' argument that the district court improperly required plaintiffs to prove "racial animus" when all that is required under § 2 is a showing of intention to accomplish the discriminatory result. *See Garza,* 918 F.2d at 771. The district court, however, stated and applied the correct standard; its reference to racial animus was simply a negative response to plaintiffs' contention that the Commissioners had displayed a racial "bias." We conclude that the district court correctly applied the relevant law in rejecting plaintiffs' discriminatory purpose claim.

CONCLUSION

We affirm the district court's ruling that plaintiffs have not demonstrated that Montana's 1992 redistricting plan was adopted with a discriminatory purpose in violation of § 2 of

the Voting Rights Act, 42 U.S.C. § 1973. We conclude, however, that the district court erred in its application of the law relevant to the third *Gingles* factor, and that this error resulted in a clearly erroneous finding that white bloc voting was not legally significant. We also conclude that the district court erred in finding proportionality between the number of legislative districts in which American Indians constituted an effective majority and the American Indian share of the voting age population of Montana. Because that error may have affected the district court's ultimate finding that, in the totality of circumstances, there was no dilution of American Indian voting strength, we reverse the judgment of the district court and remand for further appropriate proceedings.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

EARL OLD PERSON, CAROL)
JUNEAU, BILL WHITEHEAD, HERMAN
RED ELK, RONALD WILLIAMS,)
MARGARET CAMPBELL, ANDREA
BROCKIE, JOHN SUNCHILD, SR.,)
DONALD MEYERS, JOE MACDONALD,
JEANNIE PADILLA,

Plaintiffs,) NO. CV-96-004-GF

vs.)

MIKE COONEY, Secretary of State) FINDINGS OF FACT
(for the State of Montana; and and

MARC RACICOT, Governor for the) CONCLUSIONS OF LAW
State of Montana,

Defendants.)

Plaintiffs instituted the above-entitled action for declaratory and injunctive relief challenging the reconfiguration of Montana House and Senate legislative districts that occurred following the federal decennial census in 1990. Plaintiffs contend the 1992 redistricting plan dilutes the voting strength of American Indians in contravention of section 2 of the Voting Rights Act of 1965, 42 USC. § 1973, thereby denying American Indian voters a fair opportunity to elect candidates of their choice. Plaintiffs seek an order

prohibiting the continued use of the 1992 redistricting plan, and an order directing the State to reconfigure the existing legislative districts to create one additional majority Indian House District and two additional majority Indian Senate Districts.[1]

The above-entitled action came on for trial before the court, the Honorable Paul G. Hatfield, United States Senior Judge for the District of Montana, presiding, sitting without a jury, on March 16, 1998. Mr. Laughlin McDonald and Ms. Maha S. Zaki appeared as counsel on behalf of the plaintiffs. Ms. Sarah A. Bond, Assistant Attorney General, and Thomas G. Bowe, Assistant General, appeared as counsel on behalf of the defendants.

Having considered the testimony and evidence presented, the court enters the present Findings of Fact and Conclusions of Law pursuant to, and in satisfaction of, the directive of Fed.R.Civ.P.52.

FINDINGS OF FACT

A. The Parties

1. Plaintiffs are eleven American Indians registered to vote in the State of Montana.

a. Earl Old Person is an enrolled member of the Blackfeet Tribe and has been Chairman of the Tribal Business Council since 1964, and lifetime Chief of the Blackfeet Tribe since 1978. Old Person resides on the Blackfeet Indian Reservation in Glacier County.

b. Carol Juneau is an enrolled member of the Mandan and Hidatsa affiliated tribes of the Fort Berthold Indian Reservation in North Dakota. Juneau resides on the Blackfeet Indian Reservation.

c. Bill Whitehead is an enrolled member of the Assiniboine Tribe. Whitehead resides on the Fort Peck Reservation in Roosevelt County.

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1. For purposes of the Findings of Fact and Conclusions of Law set forth below, a "majority Indian Senate District" and a "majority Indian House District" describe a legislative district wherein a majority of the voting age population is American Indian.

d. Herman Red Elk is an enrolled member of the Sioux Tribe. Red Elk resides on the Fort Peck Indian Reservation.

e. Ronald Williams resides on the Fort Peck Indian Reservation. Although Williams is an Indian he is not eligible to be an enrolled member of a tribe on the Fort Peck Indian Reservation. His father is white and his mother is a Hunk Papa Sioux from Canada.

f. Margaret Campbell is an enrolled member of the Assiniboine Tribe. Campbell resides on the Fort Peck Indian Reservation.

g. Andrea Brockie (currently known as Andrea Main) is an enrolled member of the Gros Ventre Tribe of the Fort Belknap Indian Reservation. Brockie resides in Missoula, Montana.

h. Joe MacDonald is an enrolled member of the Confederated Salish and Kootenai Tribes. MacDonald resides on the Flathead Indian Reservation in Lake County.

i. Jeannine Padilla is an enrolled member of the Confederated Salish and Kootenai Tribes. Padilla resides on the Flathead Indian Reservation.

j. Donald Meyers is an enrolled member of the Chippewa-Cree Tribe. Meyers resides on the Rocky Boy Indian Reservation in Hill County.

2. At all times pertinent to this action, defendant Mike Cooney was the Secretary of State for the State of Montana. Cooney, as the chief election officer of the State, is responsible for maintaining uniformity in the application, operation and interpretation of Montana's election laws. Cooney is sued in his official capacity.

3. At all times pertinent to this action, defendant Marc Racicot was the Governor of the State of Montana. Racicot, as the chief executive officer of the State, is responsible for assuring the laws pertaining to elections are faithfully executed. Racicot is sued in his official capacity.

B. Demographics

4. According to the 1990 federal decennial census data, the total population of the State of Montana is 799,065 persons, of whom 47,679 (approximately 6%) are American

Indians.

5. The term " American Indian" is a racial classification of the Census. Persons are identified as "American Indian" by self-identification. A person may identify himself or herself as an American Indian, despite lacking eligibility for membership in an American Indian Tribe.

6. Approximately 63% of Montana's Indian population (i.e. 30,423) live within the exterior boundaries of the State's seven Indian Reservations, Blackfeet, Flathead, Rocky Boy, Fort Belknap, Fort Peck, Crow, and Northern Cheyenne. Approximately 37% of Montana' s Indian population reside in urban areas outside the Indian Reservations and Trust Lands.

7. The population of American Indians and non-Indians residing on Montana's seven Indian Reservations is set forth in the following table.

RESERVATION & TRUST LANDS	TOTAL POPU-LATION	AM. INDIAN POPULATION	PERCENTAGE AM. INDIAN
FLATHEAD	21,259	5,130	24%
BLACKFEET	8,549	7,025	82%
ROCKY BOY	1,954	1,882	96%
FT BELKNAP	2,508	2,338	93%
FT PECK	10,595	5,782	55%
CROW	6,370	4,724	74%
N. CHEYENNE	3,923	3,542	90%

8. Between 1980 and 1990 the total population in Montana increased 1.6%. The greatest population growth occurred among minorities. The population growth among American Indians was 10,409 (approximately 27.9%).

9. According to the 1990 census, American Indians

constitute 4.8% of the voting age population in Montana.

C. Districting and Appointment in Montana

10. The Montana House of Representatives consists of 100 single member districts. The Montana Senate consists of 50 single member districts formed by combining two adjoining House Districts. Members of the House serve two-year terms. Senator serves four year terms with half of the seats up for election every two years.

11. Candidates for the State legislature must be residents of the legislative district they represent if the district contains all of a county or parts of more than one county. If a county contains one or more legislative districts, a candidate must be a resident of the county in which their district is located.

12. During each legislative session preceding a federal decennial census, a Districting and Apportionment Commission ("Commission") is selected for the purpose of preparing a plan for redistricting the State into legislative districts.

13. The Commission consists of five members, none of whom may be public officials. Four of the members are chosen by the majority and minority leaders of each house. The four Commission members select the fifth member, who serves as chairman of the Commission. To achieve fair geographic representation, each of the four appointed members of the Commission must represent a different geographic region of the State.

14. Pursuant to State law, the Commission has the exclusive power to determine the geographic makeup of the legislative districts.

15. The legislature has no power concerning redistricting except for the power of recommendation.

16. Prior to submitting a redistricting plan to the legislature, the Commission must hold at least one public hearing on the plan at the State Capital. The Commission may hold other hearings as it deems necessary.

17. The Commission must submit its redistricting plan to the legislature by the tenth legislative day of the first regular session after its appointment or after the census figures are available.

18. Within 30 days after the Commission submits its redistricting plan to the legislature, the legislature must return the plan to the Commission with its recommendations.

19. Within 30 days after receiving the redistricting plans and the legislature's recommendations, the Commission must file its final redistricting plan with the Secretary of State .

20. Upon submission of the redistricting plan to the Secretary of State, the plan becomes law and the Commission is dissolved.

D. Redistricting in Montana between 1960 and 1980

21. Prior to 1966, members of the Montana Senate were elected on solely a geographical basis with one Senator representing each county in the State. Members of the House were elected upon a combined geographical and population basis, with large counties with large populations electing more than one representative. In 1965, this system was declared invalid by this court because it violated the one-person, one-vote requirement embodied in the Fourteenth Amendment of the U.S. Constitution. *See, Herweg v. 39th Legislative Assembly*, 246 F.Supp.454, 461 (D.Mont.1965).

22. As a consequence of the court's decision, the elections in 1966 utilized a combination of single and multi-member districts for both the House and the Senate.

23. In 1972, Montana's Constitution was amended to require single member districts for both the House and the Senate. The Amendment also gave the exclusive power of redistricting to a Districting and Apportionment Commission.

24. The first redistricting plan prepared by a Commission was adopted in 1974.

25. In preparing the 1974 redistricting plan, the Commission adopted redistricting criteria which included respecting political boundaries, achieving a total deviation among districts of no more than 10.9%, including "people of common interests" in the same district, e.g. rural people, urban people, and people with similar economic interests, and minorities.

26. Similar redistricting criteria were adopted by the

1982 Commission.

27. The redistricting plan prepared by the 1982 Commission contained one majority Indian House District, which included the Blackfeet Reservation in Glacier County.

E. The Redistricting Process Following the 1990 Census

28. Population changes in Montana between 1980 and 1990, caused some legislative districts created under the 1982 redistricting plan to become malapportioned and no longer reflective of the one-person, one-vote principle embodied in the Fourteenth Amendment. As a consequence, the 1992 Commission was called upon to reconfigure a number of the legislative districts in the State.

29. The 1992 Commission consisted of five non-Indians, Sheldon S. Frisbee, James J. Pasma, H.J. (Jack) Pinsoneault, Jack D. Rehberg, and Jean Fallan Barrett. Barrett replaced L.C. Gulbrandson as the Commission's chairperson, after Gulbrandson was no longer able to serve.

30. Susan Fox, an expert in social science research techniques, was employed by the Commission as its principal staff member. Fox's duties included using a specialized computer system known as Geographic Information System ("GSI"), to design illustrative redistricting plans for the Commission. Geographic features such as county lines, roads, lakes, rivers and mountains were included in the GIS software.

31. In determining appropriate district boundaries, the 1990 Commission deemed the following districting criteria as mandatory: (1) each district must consist of compact and contiguous territory; (2) all districts must be as nearly equal in population as possible (the ideal population of a House district for the 1992 redistricting was 7,990.65 persons, ideal population for the Senate was 15,981.3 persons); (3) the relative population deviation from the ideal population for an individual legislative district could not exceed plus or minus 5% (*i.e.*, House Districts could not deviate from the ideal population by more than 399 persons); (4) the population figures used in developing the redistricting plan must be derived from the 1990 federal decennial census; and (5) the redistricting plan must not dilute the voting strength of racial

or language minorities, and must otherwise comply with section 2 of the Voting Rights Act

32. The 1992 Commission adopted the following districting criteria as discretionary guidelines: (1) consideration of local government boundaries, including counties, towns and Indian reservations; (2) alignment with existing voting precincts; (3) consideration of school boundaries; (4) preservation of communities of interest, including trade areas, communication and transportation corridors, and areas with similar social, cultural, and economic interests; (5) respect for geographic boundaries; (6) consideration of existing legislative district lines; and (7) political fairness (i.e., districts may not be drawn for the purpose of favoring a political party, or to protect or defeat an incumbent).

33. Beginning on April 3, 1992, the Commission held 12 regional public hearings around the State for the purpose of presenting redistricting proposals for each region. The Commission began the redistricting process in the northwest corner of the State where greater population density allowed greater flexibility, and proceeded generally west to east and north to south.

34. Nine of the regional hearings were proceeded by planning meetings that were open to the public. All of the hearings and meetings were recorded on audio tape. Portions of the audio tapes were summarized or transcribed in the official minutes of the Commission.

35. Prior to each regional hearing, Fox prepared illustrative redistricting plans for the region under review, and presented the plan to local government officials, tribal officials, members of the public, and members of the Commission. During the regional hearings the Commission received comments from the public on the proposed redistricting plans.

36. Prior to drafting the illustrative redistricting plans, Fox met with county election officials to obtain pertinent information on election precinct boundaries and school district boundaries in the area, and also met with local government officials, local political party officials, legislators, and tribal representatives.

37. American Indians from sever of the State's Indian

reservations appeared before the Commission at the hearings and meeting, and presented alternate plans which included additional majority Indian House Districts and Senate Districts. Two of the plans, which are referred to by the parties as the "Blackfeet-Flathead Plan" and the "Rocky Boy-Fort Belknap-Fort Peck Plan", are described in more detail below.

38. Following each hearing, the public was given a period of time to submit comments on the redistricting proposals. Upon consideration of the comments, the Commission selected an appropriate redistricting plan for each region.

39. The redistricting process was complicated by Montana's low population density and natural geographic barriers that divide the State into various regions and limit road networks. Changes in the boundaries of one district had a ripple effect on the other districts.

40. In determining whether a proposal district was geographically compact the Commission did not adopt a mathematical standard, but looked generally at the size and shape of the district. In determining whether a proposed district was functionally compact, the Commission considered, *inter alia*, transportation corridors, population distribution and density, local economies, recreational activities, local climate, and important geographic features. Unlike smaller states, Montana has a significant impact on how people live, travel, conduct business, and recreate.

41. The Commission attempted to create districts that were predominantly urban or predominantly rural in order to respect urban and rural communities of interest and local government boundaries. The Commission generally regarded Indian reservations as communities of interest.

42. Following the regional hearings, the Commission created a statewide redistricting plan.

43. In January of 1993, the Commission submitted its statewide redistricting plan to the legislature for comment.

44. In February of 1993, the legislature returned the redistricting plan to the Commission with approximately eleven recommendations to modify individual district boundaries.

45. The Commission accepted approximately one-half of

the recommendations of the legislature.

46. On February 24,1993, the Commission filed its statewide redistricting plan with the Secretary of State, whereupon the plan became law and the Commission was dissolved.

47. Prior to the 1992 redistricting plan, there were four majority Indian House Districts in Montana. As discussed above, one majority Indian House District had been created by the 1982 redistricting plan. The other three majority Indian House Districts were majority white districts in 1982, but became majority Indian House Districts by 1990 as a consequence of the growth of the American Indian population.

The 1992 redistricting plan increased the number of majority Indian House Districts to five House Districts (*i.e.*, House Districts 5,6,85,92 and 98). The newly created majority Indian House District, was House District 92 which contains the Rocky Boy and Fort Belknap Indian Reservations in Hill and Blaine Counties. House District 85 contains the Blackfeet Indian Reservation in Glacier County. House District 98 contains the Fort Peck Indian Reservation in Roosevelt County. House District 5 contains the Northern Cheyenne Indian Reservation, and a portion of the Crow Indian Reservation in Rosebud and Big Horn Counties. House District 6 contains a portion of the Crow Reservation in Big Horn County and the portion of the Crow Reservation in Yellowstone County.

48. The following table describes the percentage of the voting age population which is American Indian, in each of the five majority Indian House Districts.

DISTRICT	RESERVATION	COUNTY(IES)	% AM. INDIAN
HD 5	N. CHEYENNE & CROW	BIG HORN & ROSEBUD	50%
HD 6	CROW	BIG HORN & YELLOWSTONE	53%
HD 85	BLACKFEET	GLACIER	66%

HD 92	ROCKY BOY & FORT BELKNAP	HILL, CHOUTEAU, BLAINE, PHILLIPS	52%
HD 98	FORT PECK	ROOSEVELT	55%

49. American Indians constitute a much smaller portion of the voting age population in the remaining 95 House Districts. The next highest concentration of voting age American Indians is found in House District 73, (includes part of the Flathead Reservation) wherein American Indians constitute 28% voting age population, followed by House District 86 (includes part of the Blackfeet Reservation) which is 19% American Indian, and House District 74 (includes part of the Flathead Reservation) which is 14% American Indian. American Indians constitute less than 11% of the voting age population in the remaining 92 House Districts.

50. The 1982 redistricting plan did not contain any majority Indian Senate Districts. .Between 1982 and 1990, one majority white Senate District became a majority Indian Senate District as a consequence of the growth of the American Indian population of the Crow and Northern Cheyenne Reservations in southeast Montana. Under the 1990 redistricting plan, the number of majority Indian Senate Districts remained at one Senate District, Senate District 3. Senate District 3 includes the Crow and Northern Cheyenne Reservations in House Districts 5 and 6. American Indians constitute 51% of the voting age population in Senate District 3.

F. The Plaintiff's Claims

51. Plaintiffs challenge the State's 1992 redistricting plan on the ground it dilutes the voting strength of American Indians in violation of section 2 of the Voting Right Act. The challenge asserted by the plaintiffs has two prongs. First, plaintiffs allege the redistricting plan was adopted with

a discriminatory purpose in violation of section 2. Second, plaintiffs allege the redistricting plan has discriminatory effect in violation of section 2.

In support of their discriminatory purpose claim, plaintiffs presented evidence on, *inter alia*, the history of relations between white and Indian persons in Montana, and excerpts from the official minutes of the regional hearings and meeting of the 1992 Commission, which purport to show the Commission intentionally discriminated against Indians.

In support of their discriminatory effect claim, plaintiffs presented evidence on *inter alia*, (1) the Blackfeet-Flathead Plan and the Rocky Boy-Fort Belknap-Fort Peck Plan which purport to show that Indians are sufficiently compact in northwest Montana create additional majority Indian House and Senate districts in these areas; and (2) voting records from various primary and general elections conducted in Montana from 1988 through 1994, which purport to show that voting by whites and Indians is racially polarized.

Plaintiffs seek an order directing the State to modify its redistricting plan to create an additional majority Indian House District and Senate District in northwest Montana, as proposed under the Blackfeet-Flathead plan, and an additional majority Indian Senate District in northeast Montana, as proposed under the Rocky Boy-Fort Belknap-Fort Peck plan.

52. Plaintiffs originally challenged the State's 1992 redistricting plan as it affected the area encompassing the Crow and Northern Cheyenne Reservations located in southeast Montana. However, plaintiffs moved to dismiss this claim after discovery revealed the redistricting plan did not dilute the voting strength of American Indians residing in this area of the State. The motion was granted by the court on March 4, 1997.

G. Redistricting Plans Proposed by the Plaintiffs

53. Plaintiffs' expert, William Cooper, a demographer with the Virginia Affiliate of the American Civil Liberties Union (" ACLU"), prepared a number of redistricting plans in connection with both the 1992 redistricting process and the present litigation. One redistricting plan, referred to

above as the Blackfeet-Flathead Plan, was prepared for the purpose of showing an additional majority Indian House District and Senate District could be created in northwest Montana in the area of the Blackfeet and Flathead Indian Reservations.

A second redistricting plan, referred to above as the Rocky Boy-Fort Belknap-Fort Peck Plan, was prepared for the purpose of showing an additional majority Indian Senate District could be created in northeast Montana, in the area of the Rocky Boy, Fort Belknap and Fort Peck Indian Reservations.

54. In preparing these redistricting plans, Cooper attempted to follow traditional redistricting principles such as one person-one vote, contiguity and compactness. Cooper was also mindful of the redistricting standards included in the mandatory and discretionary criteria adopted by the Commission.

a. The Blackfeet-Flathead Plan

55. Under the Blackfeet-Flathead Plan, a new majority Indian House District would be created in northwest Montana by enlarging House District 73. A new majority Indian Senate District would be created by reconfiguring the existing majority Indian House District 85 and combining it with the enlarged House District 73.

56. The House District 73 proposed by plaintiffs stretches from the southern part of the Blackfeet Reservation in Glacier County to Pondera County, and west across the Continental Divide (including sparsely populated areas of Glacier National Park and various Wilderness areas south of Glacier Park) to the southeast portion of the Flathead Reservation in Lake County. American Indians reside on the Flathead Reservation in the southwest end of proposed House District 73, and on the Blackfeet Reservation in the northeast end of proposed House District 73. The mountainous central portion of the proposed House District 73 is lightly populated and few Indians or non-Indians reside there. According to the 1990 Census, the Glacier National Park Division of Flathead County contains only 98 persons, of whom 97 are white. The South Fork Flathead Division

contains 1,957 persons, of whom 1,888 are white.

57. The House District 85 proposed by plaintiffs is located entirely within Glacier County. It consists of a strip of land that runs generally in a north-south direction from the northeast corner of Glacier County to the counties' southern border. American Indians reside primarily on the Blackfeet Indian Reservation in the northern portion of Glacier County.

58. The populations in proposed House Districts 73 and 85 deviate from the ideal population for a House District by less than 5%.

59. To convert that House District 73 into a majority Indian House District, Cooper proposed that House District 73 be enlarged to include a portion of the Blackfeet Reservation currently located in House District 85. The proposed change would increase the percentage of voting age American Indians in House District 73 to 57%, and reduce the percentage of voting age American Indians in House District 85 from 66% to approximately 57%.

60. The boundary between proposed House District 73 and 85 is Going-to-the-Sun Highway in Glacier National Park. This recreational road is normally closed for seven months of the year, from late October until late May due to heavy snowfall in the area.

61. U.S. Highway 2, which crosses the Continental Divide at Marias Pass near the southern boundary of Glacier National Park, is the only year-round road across the Continental Divide providing access between the populated areas in proposed House Districts 73 and 85.

62. The fact House District 73 crosses the Continental Divide is not unusual. A number of legislative districts in both the 1982 and 1992 redistricting plans also cross the Continental Divide. Under the 1982 plan, House Districts 47, 66, 70, and 72, and Senate Districts 24, 33, 35 and 36 cross the Continental Divide. Under the 1992 redistricting plan, House Districts 33, 50, 55, and 57 and Senate Districts 17, 25, 28, and 29 cross the Continental Divide.

63. The presence of the Continental Divide in proposed House District 73 would not operate as a significant impediment to voting or campaigning, because U.S. Highway 2 provides year-round travel across the divide.

64. Proposed House District 73 and 85 are exceptional as

far as their lengths are concerned. Proposed House District 73 is 85 miles in length. Proposed House District 115 is 90 miles long. By contrast, under the 1992 redistricting plan, House District 47 and 48 are both 156 miles long, House District 93 is 157 miles long, and House Districts 1 and 99 are both 197 miles long.

65. The Senate District proposed under the Blackfeet-Flathead plan is unexceptional in length. The proposed Senate District is 142 miles long. The distance by road from Arlee in the southwest portion of proposed House District 73 to the Canadian border in the northeast portion of the proposed House District 85 is approximately 233 miles. By contrast, under the 1992 redistricting plan, Senate Districts 1, 48 and 50 are 197 miles long, and Senate 4 is 208 miles long.

66. To travel by road from the Swan Valley in proposed House District 73 to other parts of proposed House District 73 would require some travel outside of the proposed House District. To travel by road from the Flathead Reservation in proposed House District 73 to the Blackfeet Reservation in proposed House District 85 would require some travel outside of the proposed Senate District encompassing these two House Districts. The fact these districts cannot be traversed without leaving the district is not unusual. Both the 1982 redistricting plan and the 1992 redistricting plan contain House Districts which cannot be traversed from one end to the other without leaving the district.

67. Persons campaigning in the Senate District created by House Districts 73 and 85 would incur some additional expense in advertising because the House Districts are served by different print and broadcast markets. Residents of the Blackfeet Reservation received broadcast media from Shelby, Great Falls and Canada, and print media from the Browning, Cut Bank and Great Falls. In contrast, residents of the Flathead Reservation generally receive broadcast and print media from Missoula, Polson and Kalispell.

68. The tribes of the Blackfeet and Flathead Indian Reservation share many common political and economic interests with all Indians in the State. However, there are some political and economic Differences between the Blackfeet Reservation and the Flathead Reservation.

a). The Blackfeet Reservation is populated predominately by American Indian Democrats. The Flathead Reservation is populated predominately by white Republicans.

b). The tribes located on the respective reservations have different treaty relationships with the United States.

c). Timber is an important natural resource on the Flathead Reservation, while oil and gas are important natural resources on the Blackfeet Reservation.

d). The Flathead Reservation is administered from the Portland, Oregon office of the Bureau of Indian Affairs ("BIA"). The Blackfeet Reservation is administered from the Billings, Montana BIA office.

e). The Flathead Reservation and Blackfeet Reservation differ in their jurisdictional relationship with Montana. The Flathead Reservation is the only Public Law 280 reservation in Montana. Thus, if an Indian is charged with the commission of a felony on the Flathead Reservation, Montana state court have jurisdiction. In contrast, if an Indian is charged with a felony on the Blackfeet Reservation, jurisdiction is lies exclusively with the federal courts.

f). Most of the land contained within the exterior boundaries of the Blackfeet Reservation are tribally owned. If a non-Indian owner offers to sell land, the Tribe has the first opportunity to buy it. In contrast, the Flathead Reservation is affected significantly by non-Indian homesteading and the Allotment Act, resulting in non-Indian ownership of a substantial portion of the land on the reservation.

b. The Rocky Boy-Fort Belknap-Fort Peck Plan

69. The Rocky Boy-Fort Belknap-Fort Peck Plan proposes the creation of a majority Indian Senate District 46, by expanding House District 92 and combining it with an expanded House District 98.

70. The House District 92 proposed by the plaintiffs extends east from the west border of the Fort Belknap Indian reservation across the southern part of Phillips County to the west border of Valley County.

71. The House District 98 proposed by the plaintiffs extends west from the southern part of the Fort Peck Indian reservation in Roosevelt County across the southern part of Valley County to the west border of Valley County.

72. Proposed House Districts 92 and 98 are contiguous for a short distance at the boundary of Phillips and Valley Counties.

73. The populations in proposed House Districts 92 and 98 deviate from the ideal population for a House District by less than 5%.

74. Most of the American Indians residing in House District 98 live in a narrow strip along the southern edge of the Fort Peck Reservation between U.S. Highway 2 and the Missouri River.

75. American Indians constitute approximately 56% of the voting age population in proposed House District 92, approximately 62% of the voting age population in proposed House District 98, and approximately 59% of the voting age population in proposed Senate District 46.

76. Proposed House District 92 is 129 miles long. Proposed House District 98 is 134 miles long,

77. Proposed Senate District 46 is very long and narrow, stretching approximately 252 miles across pats of six counties in northcentral and northeastern Montana. Although some Senate Districts under the 1992 redistricting plan are comparable in length, no Senate District splits six counties like proposed Senate District 46.

78. Because of its odd shape, proposed Senate District 46 was referred to by the parties as the "dragon."

79. Generally speaking, the Rocky Boy and the Fort Belknap Indian Reservations are located on the west end of proposed Senate District 46. The populated portions of the reservation are located approximately 100 miles apart.

80. The center portion of proposed Senate District 46, which is located in southern Phillips and Valley Counties, is a sparsely inhabited. The Southern Division of Phillips County contain 394 persons, of whom 359 are White. The Southern Division of Valley County contains 714 persons, of whom 700 are white.

81. There are no paved roads in the portion of proposed Senate District 46 located in the southern portions of Phillips

and Valley Counties. The only direct roadway between the Fort Belknap Reservation and the Fort Peck Reservation is U.S. Highway 2, which lies a number of miles north of proposed Senate District 46. It is not possible to travel by paved road between the Fort Belknap Reservation and the Fort Peck Reservation without leaving proposed Senate District 46.

82. The Rocky Boy and Fort Belknap Reservations utilize different media center, commercial centers and transportation routes than the Fort Peck Reservation. The Rocky Boy and Fort Belknap Indian reservations receive their broadcast and print media from Havre, Chinook, Fort Belknap, and Great Falls. Havre is the primary commercial center for the Rocky Boy and Fort Belknap Reservations. On the other hand, the Fort Peck Reservation receives broadcast media from Wolf Point, Montana and Williston, North Dakota, and print media from Wolf Point and Billings. Glasgow is the primary commercial center for the Fort Peck Reservation.

83. Personal contact with voters in proposed Senate District 46 would require extensive time and travel because the main populations of voters are at opposite ends of the proposed Senate District. Reaching voters through the media would require the expense of advertisements in separate media-markets.

84. Senators Jergeson and Nelson testified that campaigning in proposed Senate District 46 would be difficult because residents in Fort Belknap and Rocky Boy area tend to interact with communities to the west, whereas people in the Fort Peck area tend to interact with their own communities and communities to the east, including North Dakota.

85. Plaintiff Margarett Campbell is an enrolled member of the Assiniboine Tribe on the Fort Peck Reservation. From 1982 until mid-1996, Campbell worked in Fort Belknap. During those years, Campbell voted in state, county, and local elections in Blaine County, but never voted in the elections of her own tribe on the Fort Peck Reservations. She testified that the significant distance between Fort Belknap and Fort Peck caused her to be unfamiliar with the candidates and issues at Fort Peck.

H. Expert Testimony Pertaining to Voting Records

86. The plaintiffs' expert, Dr. Joe Floyd and the defendants' expert, Dr. Jeffrey Zax, were retained by the respective parties to determine, *inter alia*, (1) whether Indians are politically cohesive; and (2) whether voting by whites and Indians is racially polarized.

87. To make these determinations, each expert analyzed precinct election returns using a standard statistical technique known as bivariate ecological regression analysis ("BERA").

88. An ecological regression analysis compares the votes a candidate gets in an election with the racial composition of the voting age electorate, and produces estimates of the voting behavior of minority and non-minority voters. An ecological regression analysis does not determine the voting behaviors of individual voters, or determine the exact voting behavior of a group of individuals.

89. There are two distinct types of ecological regression analyses, a double equation BERA and a single equation BERA. A double equation BERA accounts for roll-off, which occurs when a voter signs the poll-book but fails to vote in the election being analyzed.

a. Political Cohesion By American Indians

90. Dr. Zax defined minority voter cohesion as a voting practice where at least 60% of the minority electorate vote for the same alternative. Dr. Floyd did not provide a definition for minority voter cohesion.

91. To determine whether American Indians in Montana were politically cohesive, Dr. Zax reviewed election data from 257 statewide races held in election years 1994 and 1996, in eight House Districts with boundaries that would be significantly altered under the redistricting plans proposed by the plaintiffs (i.e., HDs 73,74,80,85,91,92,97 and 98). These House Districts were referred to by the parties as the "challenged" House Districts. The 257 statewide races consist of general elections and retention elections for federal and State offices, and elections on statewide ballot issues.

92. Of the 257 races studied, 108 races occurred in 1994, and 149 races occurred in 1996.

93. Based upon his analysis, Dr. Zax concluded that American Indians voted cohesively in 74% of the races held in 1996.

94. During the trial, defendants stipulated that American Indians were politically cohesive for purposes of this action.

b. Racial Polarization -- Dr. Floyd's Analysis

95. To determine whether voting by whites and American Indians were racially polarized for purposes of this action, Dr. Floyd conducted a BERA analysis on 38 primary and general elections held between 1984 and 1996, wherein an Indian candidate opposed a white candidate for a position in State, federal or county government.

96. Dr. Floyd's BERA analysis was based upon election data obtained from 7 counties with a significant Indian population : Big Horn County, Rosebud County, Blaine County, Glacier County, Hill County, Lake County and Roosevelt County. Only the latter five counties are located within the two geographic areas challenged in this action. Big Horn and Rosebud County are located in House Districts 5 and 6 in southeast Montana.

97. Plaintiffs obtained the election data used in Dr. Floyd's BERA analyses from election returns, poll-books and voter registration lists provided by the Clerk and Recorders of the respective counties.

98. To conduct a BERA analysis it is necessary to identify, with respect to each election precinct under review, the total number of whites and American Indians of voting age residing in the precinct, and the total number of votes cast for each candidate.

99. Determining the number of voting age American Indians and whites in a precinct is an easy matter in States that maintain voter registration by race and precinct, or report the precinct lines to the census. In the latter case, the census determines voting age population by race or ethnicity for each precinct. Montana, however, is one of a handful of states that does not report its precinct lines to the census, and fails to maintain precinct registration by race or ethnicity.

100. Accordingly, plaintiffs attempted to determine the number of American Indians of voting age in the election

precincts by comparing poll books and voter registration lists provided by the County Clerk and Recorder, with tribal membership roles and other tribal records. Plaintiffs also reviewed the poll books and voter registration lists and identified, based upon their personal knowledge, those persons generally recognized in the community as being Indian. A handwritten mark was placed on the voting records next to the name of a voter Identified as an American Indian. Plaintiffs considered persons to be American Indian if they were members of a tribe or were considered as an Indian by members of an Indian tribe or Indian community.

101. Plaintiffs' Indian voter identifications were received into evidence as a proffer without objection by defendants, subject only to defendants' right to cross-examine Dr. Floyd on whether the number of American Indians of voting age in each precinct were accurately counted, and whether the standard used to classify a person as an American Indian was appropriate.

102. The following table lists the 38 federal, State and county elections analyzed by Dr. Floyd.

Elections Analyzed by Dr. Floyd

County	Year	Contest	Indian Candidates
Big Horn	1988	SD 50 General	Yellowtail
	1990	County Comm. Dist. 1 Primary	Howe Lefthand

Elections Analyzed by Dr. Floyd

County	Year	Contest	Indian Candidates
		Clerk & R. Primary	Crookedarm
		Sheriff Primary	Medicinehorse
		HD 99 General	Russell
		Sheriff General	Medicinehorse
		Clerk & R. General	Crookedarm
	1992	Clerk Dist. Ct. Primary	Birdinground
		County Comm. Primary	Doyle
		Clerk Dist. Ct.	Birdinground

Elections Analyzed by Dr. Floyd

County	Year	Contest	Indian Candidates
		County Comm. General	Doyle
		SD 50 General	Yellowtail
		HD 99 General	Russell
Blaine	1990	County Comm. Demo. Primary	Main
	1992	HD 16 Demo. Primary	Stiffarm
	1996	U.S. Cong. Demo. Primary	Yellowtail
		U.S. Cong. General	Yellowtail
Glacier	1996	U.S. Cong. Demo. Primary	Yellowtail

Elections Analyzed by Dr. Floyd

County	Year	Contest	Indian Candidates
		U.S. Cong. General	Yellowtail
Hill	1996	U.S. Cong. Demo. Primary	Yellowtail
		U.S. Cong. General	Yellowtail
Lake	1996	U.S. Cong. Demo. Primary	Yellowtail
		U.S. Cong. General	Yellowtail
		HD73 General	Bick
		SD 37 General	Demarais
Roosevelt	1998	SD 10	Trinder
	1990	Sheriff General	Grainger

Elections Analyzed by Dr. Floyd

County	Year	Contest	Indian Candidates
	1992	HD 20 Demo. Primary	Lucas
	1996	U.S. Cong. Demo. Primary	Yellowtail
		U.S. Cong. General	Yellowtail
		HD 98 Demo. Primary	Whitehead
Rosebud	1984	SD 50 General	Yellowtail
		HD 100 General	Small
		Supreme Ct. General	Turnage
	1986	HD 100 General	Whitewolf
	1988	SD 50 General	Yellowtail

Elections Analyzed by Dr. Floyd

County	Year	Contest	Indian Candidates
	1992	SD 50 General	Yellowtail
		Supreme Ct. General	Turnage

103. With respect to the referenced elections, Dr. Floyd first analyzed all 38 elections using a single equation BERA. The election data for each type of election was aggregated, and an average cohesion figure was calculated. For example, an average cohesion figure was calculated for all primary elections for a State House seat.

104. Following consultation with another expert on BERA analyses, Dr. Floyd deemed it appropriate to re-analyze a number of the referenced elections using a different approach. This time, only the general elections were analyzed with a single equation BERA, the primary elections were analyzed using a double equation BERA. Under the second analysis, election data was aggregated by election type and year, and an average cohesion figure was calculated. For example, an average cohesion figure was calculated for all primary elections for a State House seat occurring in 1990.

105. Prior to undertaking the second BERA analysis, dr. Floyd concluded that 11 of the 38 referenced elections previously analyzed were not appropriate for a BERA analysis, because the elections had less than 10 precincts, or critical precinct data was unavailable. Accordingly, Dr. Floyd did not conduct a second BERA analysis on the following 11 elections: (1) the 1992 primary election for County Commission in Big Horn County; (2) the 1996

primary election for House District 98 in Roosevelt County; (3) the 1984 general election for State Supreme Court in Rosebud County; (4) the 1984 general election for Senate District 50 in Rosebud County; (5) the 1984 general election for House District 100 in Rosebud County; (6) the 1986 general election for House District 100 in Rosebud County; (7) the 1988 general election for Senate District 50 in Rosebud County; (8) the 1988 general election for Senate District 50 in Big Horn County; (9) the 1992 general election for State Supreme Court Rosebud County; (10) the 1992 general election fro County Commission in Big Horn County; and (11) the 1996 general election for House District 73 in Lake County.

106. Subsequent to the completion of his second BERA analysis, Dr. Floyd learned that some of the voter counts relied upon in the first two BERA analyses were erroneous. Accordingly, Dr. Floyd corrected the voter count errors, and re-ran the BERA analyses.

107. The following table contains the final results of Dr. Floyd's double equation BERA analysis for the 12 primary elections he studied under his second BERA analysis. Floyd calculated an average cohesion figure for each type of primary election, and an average cohesion figure for all 12 primary elections.

Election	**Elections**	**% Indians Voting for Indian Cand.**	**% Whites Voting for White Cand.**
1990 Cl. & Recorder	1	96	75
1992 Dist. Ct. Cl.	1	85	94
1990 Sheriff	1	53	71
1990 Cty. Comm.	2	77 (avg)	98 (avg)

1992 State House	2	78 (avg)	83 (avg)
1996 U.S. House	5	88 (avg)	53 (avg)
Average for all elections:		80%	79%

108. The following table contains the final results of Dr. Floyd's single equation analysis for the 15 general elections he studied under his second BERA analysis. Dr. Floyd calculated an average cohesion figure for each type of general election, and an average cohesion figure for all 15 general elections.

Election	**Number**	**% Indians Voting for Indian Cand.**	**% Whites Voting for White Cand.**
1990 Cl. & Recorder	1	100	87
1992 Dist. Ct.Cl.	1	31	100
1990 Sheriff	2	89 (avg)	56 (avg)
1988 State Senate	1	95	55
1992 State Senate	2	88 (avg)	74 (avg)
1996 State Senate	1	100	70
1990 State House	1	88	75
1992 State House	1	82	79
1996 U.S. House	5	98 (avg)	65 (avg)

Average for all all elections: 86% 73%

109. Based upon these BERA analyses, Dr. Floyd concluded all of the primary elections he studied were racially polarized because, on average, approximately 80% of the Indian voters favored the Indian candidates, and approximately 79% of the white voters favored white candidates.

110. Dr. Floyd concluded all of the general elections he studied were racially polarized, except the 1992 general election for District Court Clerk in Big Horn County. On average, approximately 86% of the Indian voters favored Indian candidates, and approximately 73% of the white voters favored white candidates.

111. To supplement the results of his final BERA analyses, Floyd conducted a homogenous precinct analysis on 2 precincts where American Indians constituted at least 90% of the voting age population.

112. A homogenous precinct analysis looks at precincts of predominately one race (90% or more), and determines the number of white voters voting for white candidates, or the number of minority voters voting for minority candidates. If, for example, in an Indian/non-Indian contest the white candidate got most or all of the votes in a majority white homogenous precinct, that is direct evidence that whites in that precinct voted along racial lines.

113. The homogenous precinct analysis conducted by Floyd on the two predominately American Indian precincts showed that racially polarized voting occurred in both precincts.

114. Because Dr. Floyd aggregated voting data from elections in Big Horn and Rosebud Counties with voting data from the five counties located in the eight challenged House Districts, he was unable to determine the extent of polarized voting in the eight challenged House Districts.

c. Racial Polarization --Dr. Zax's Analysis

115. Dr. Zax defined racially polarized voting as a voting practice where 60% of the minority voters vote one way in an election, and 60% of the white voters vote for the other

alternative.

116. To determine whether voting by whites and American Indians was racially polarized for purposes of this action, Dr. Zax conducted a double equation BERA analysis on statewide general elections, retention elections and ballot issues, held in election years 1994 and 1996, in 24 State House Districts (*i.e.*, HDs 73-92 and 95-98) located in the two geographic areas where plaintiffs contend additional majority Indian House Districts should be created. These 24 House Districts include the eight challenged House Districts that would be modified significantly under plaintiffs' proposed redistricting plans (*i.e.*, HDs 73, 74, 85, 86, 91, 92, 97 and 98). The other 16 House Districts are physically adjacent to the eight challenged House Districts, and could be subject to boundary changes under the plaintiffs' proposed redistricting plans.

117. Dr. Zax examined a total of 257 elections in the eight challenged House Districts.

118. The 257 elections consisted of general elections and retention elections for federal and State offices, and elections on statewide ballot issues.

119. Dr. Zax did not examine any primary elections, or elections for county offices.

120. Dr. Zax did not analyze any elections occurring before 1994, because the 1992 redistricting plan challenged by the plaintiffs in this action did not become effective until early 1993.

121. As discussed above, to conduct a BERA analysis it was necessary to identify , with respect to each election precinct under review, the total number of whites and Indians of voting age residing in the precinct.

122. To determine the number of Indians and whites of voting age in the election precincts, Dr. Zax undertook the following three- step protocol. First, Dr. Zax identified the number of Indians and whites of voting age in the relevant census blocks by examining records maintained by the Census Bureau. Second, precinct map overlays prepared by GeoEconomics, a geographic mapping business in Missoula were placed on the census bloc maps. Third, precinct boundaries and census bloc I boundaries were compared, and census bloc population data was apportioned to the

appropriate election precincts.

123. When the precinct boundaries and census bloc boundaries were not coterminous, Dr. Zax assumed the population was distributed uniformly within the census bloc. For example, when a precinct line split a census bloc in half, Dr. Zax assigned one-half of the population of the bloc to each side of the precinct line.

124. Based upon his analysis, Dr. Zax found that 17 of the 108 elections held in 1994 were racially polarized (approximately 16%), and that 41 of the 149 elections held in 1996 were racially polarized (approximately 28%).

125. Dr. Zax also conducted individual BERA analyses on twelve primary elections and fifteen general elections from the eight challenged House Districts wherein a white candidate opposed an Indian candidate for a position in State, federal or county government. A review of Dr. Zax's individual BERA analyses shows six of the twelve primary elections (i.e., 50%) were racially polarized, and twelve of the fifteen general elections (i.e., 80%) were racially polarized.

d. Vote Dilution --i.e.. Whites Vote as a Bloc to Usually Defeat the Minority Preferred Candidate

(i) Dr. Zax's Analysis on Vote Dilution

126. Plaintiffs did not offer any expert testimony on the issue of vote dilution, i.e., whether whites vote as a bloc to usually defeat the minority preferred candidate.

127. Defendants, through Dr. Zax, offered expert testimony on the extent of vote dilution occurring in the 257 general elections, retention elections and ballot issue elections held in the eight challenged House Districts in 1994 and 1996.

128. To determine whether vote dilution existed in the eight challenged House Districts, Dr. Zax undertook a two-step inquiry. First, he identified the elections that were racially polarized. Second, he determined the number of polarized elections wherein the candidate preferred by the American Indian voters was defeated.

129. With respect to the three majority Indian House Districts (HDs 85, 92 and 98), Dr. Zax examined a total of 94

elections. Dr. Zax found that 25 of the 94 elections were racially polarized (approximately 27%), and that the Indian preferred candidate or alternative was defeated in 4 of the 25 polarized elections (16%).

130. Because the Indian majority is not large in either House District 92 (approximately 52%) or House District 98 (approximately 55%), Dr. Zax attributed the high rate of success of the Indian preferred candidate/alternative to white cross-over voting.

131. In any event, Dr. Zax concluded that legally significant vote dilution did not occur in House Districts 85, 92 and 98.

132. With respect to the five majority white House Districts (HDs 73, 74, 86, 91 and 97), Dr. Zax analyzed a total of 163 elections. Dr. Zax concluded that 33 of the 163 elections were racially polarized (approximately 20%), and that the Indian preferred candidate/alternative was defeated in all 33 of the polarized elections.

133. Because American Indians constitute less than 30% of the voting age population in House District 73, and less than 20% of the voting age population in House Districts 74, 86, 91 and 97, Dr. Zax concluded that vote dilution is mathematically certain to occur in these five majority white House Districts anytime an election is racially polarized.

134. The court finds that Dr. Zax's testimony is not particularly instructive in determining whether legally significant vote dilution exists in the eight challenged House Districts. First, by considering all 257 general elections together in a single statistical analysis, Dr. Zax failed to take into account that certain types of elections may provide more probative evidence in determining the existence of vote dilution than others. For example, elections with both a white candidate and an American Indian candidate generally provide more probative evidence of vote dilution than an election with two white candidates, because the latter elections may not provide American Indians a genuinely preferred candidate. Second, Dr. Zax's vote dilution analysis was limited to elections in which a candidate or alternative preferred by 60% of the American Indian voters was defeated by a white bloc vote consisting of 60% of the white voters. In the opinion of this court, the analysis should have

included all elections in which the candidate or alternative preferred by a majority of American Indian voters was defeated by a white bloc vote consisting of 60% of the white voters.

(ii) Election in the Eight Challenged House Districts in 1994 and 1996 with White and American Indian Candidates

135. In 1994 and 1996 there were seven primary elections in the eight challenged House Districts wherein a white candidate opposed an American Indian candidate for a position in State or federal government.

136. Individual BERA analyses were conducted on six of the seven primary elections; the 1996 Democratic primary elections for the United States House of Representatives in Glacier County (includes HD 85 and a portion of HD 86), Lake County (includes HD 73 and a portion of HD 74), Roosevelt County (includes HD 98 and a portion of HD 97), Blaine County (includes a portion of HD 91 and HD 92) and Hill County (include a portion of HD 91 and HD 92), and the 1996 Democratic primary election for House District 98.[2]

Because neither party conducted a BERA analysis on the 1994 primary election for House District 92 between American Indian Bert Corcoran and non-Indian Matt McCann, the court cannot determine whether Corcoran was the Indian preferred candidate, or whether the Indian preferred candidate was defeated by white bloc voting.

137. In the 1996 Democratic primary election for House District 98, the candidates were Bill Whitehead, an American Indian, and Dore Schwinden, a non-Indian incumbent who was the Indian preferred candidate for House District 98 in 1994. Whitehead defeated Schwinden in the Democratic primary and went on to win the 1996 general election without opposition. The BERA analysis conducted by Dr. Zax showed that Whitehead received approximately 89% of the American Indian vote and approximately 7% of the white vote, whereas Schwinden received approximately 11% of the American Indian vote and approximately 93% of the white vote. Accordingly, the Indian preferred candidate prevailed in this election.

138. In the 1996 Democratic primary elections for United State House of Representatives, Bill Yellowtail, an American

Indian, ran against three non-Indians candidates. Yellowtail prevailed in Glacier County, Lake County, Roosevelt County, Blaine County and Hill County. The individual BERA analyses conducted by Dr. Zax on these five primary elections shows that Yellowtail received 92% of the American Indian vote and 44% of the white vote in Glacier County, 85% of the American Indian vote and 45% of the white vote in Lake County, 85% of the American Indian vote and 39% of the white vote in Roosevelt County, 82% of the American Indian vote and 47% of the white vote in Blaine County, and 93% of the American Indian vote and 50% of the white vote in Hill County. Accordingly, the court finds the Indian preferred candidate prevailed in all five elections.

139. In 1994 and 1996 there were eleven general elections in the eight challenged House Districts wherein a white candidate opposed an American Indian candidate for a position in State or federal government; the 1994 general election for House District 85, the 1996 general election for State House District 73, the 1996 general elections for Senate District 37 in House Districts 73 and 74, and the 1996 general elections for the United States House of Representatives in House Districts 73, 74, 85, 86, 91, 92 and 98.

140. All eleven of the general elections were split preference elections with the American Indian voters and white voters preferring different candidates. In four of the elections, the Indian candidate prevailed.

141. In seven of the eleven elections (64%), the Indian preferred candidate was defeated as a result of white bloc voting. Specifically, in the 1996 general election for State House District 73, Rick Jore, the white preferred candidate, defeated Ron Bick, the Indian preferred candidate, with 66 % of the white vote. In the 1996 general elections for Senate District 37, Mike Taylor, the white preferred candidate, defeated Debbie Demarias, the Indian preferred candidate, in House Districts 73 and 74 with 61.6% of the white vote, and 71.5% of the white vote respectively. In the 1996 general elections for the United States House of Representatives, Rick Hill the white preferred candidate, defeated Bill Yellowtail, the Indian preferred candidate, in House Districts 73, 74, 86 and 91, with 65.9% of the white vote, 66.9% of the

white vote, 69.1% of the white vote, and 60.2% of the white vote respectively.

142. A review of these seventeen primary elections and general elections reveals that whites voted as a bloc to defeat the American Indian candidate in seven of the seventeen elections. Based upon these statistics, the court finds that legally significant white bloc voting did not occur in these elections involving American Indian candidates.

(iii) General Elections with Two White Candidates

143. In 1994 and 1996, there were 100 general elections held in the eight challenged House Districts involving two white candidates.

144. The only white vs. white elections with probative value in determining vote dilution are those elections where American Indian voters and white voters preferred different candidates.

145. Of the 100 white vs. white elections, 52 were split-preference elections. In 21 of the 52 split-preference elections (approximately 40%), the Indian preferred candidate was defeated by I white bloc voting.

146. Based upon foregoing statistics, the court finds that legally significant white bloc voting did not occur in the 52 white vs. white split-preference elections.

(iv) Elections Involving Ballot Issues

147. In 1994 and 1996 there were 128 ballot issue elections in the eight challenged House Districts.

148. The only ballot issue elections with probative value are those elections where American Indian voters and white voters preferred different alternatives.

149. Of the 128 ballot issue elections, 65 were split-preference elections. In 14 of the 65 split-preference elections (approximately 22%), the Indian preferred alternative was defeated by white bloc voting.

150. Based upon the foregoing statistics, the court finds that legally significant white bloc voting did not occur in the 65 ballot issue elections where American Indians and whites differed on a preferred alternative.

(v) Retention Election

151. In 1994 and 1996 there were eighteen retention elections in the eight challenged House Districts.

152. The only retention elections with probative value in

determining vote dilution, are those elections where a American Indian voters and white voters preferred different alternatives.

153. Of the 18 retention elections, none were split-preference elections. Accordingly, the court finds that none of the retention elections have probative value.

I. Senate Factors --Totality of Circumstances

a. History of Discrimination

154. The history of official discrimination against American Indians during the 19th century and early 20th century, by both the State and federal government, is not disputed by the defendants. The tension between the recognition of Indian tribes as independent sovereigns and efforts to assimilate Indian people led to inconsistent federal policies, such as the creation of reservations for Indians, and then the opening of reservations to settlement by no-Indians.

155. Plaintiffs' expert, Dr. Charles Heidenreich, a cultural anthropologist, described a number of acts of discrimination against Indians, by the State and federal government, dating back prior to Montana's statehood.

(i) Pre-territorial Days

156. Prior to the establishment of the Montana Territory, the United States entered into a number of treaties with Indians residing in what would later become Montana. One of the purposes of these treaties was to extinguish Indian title to large tracts of land so white settlements could be extended, and Indians could be moved to more suitable locations where they could be controlled and domesticated.

(ii) Territorial Days

157. The first legislative assembly of the Montana territory excluded Indians from voting for congressional, territorial and county offices by limiting voting to white male citizens of the United States, and by prohibiting persons. under guardianship from voting.

158. Successive territorial assemblies in 1867, 1871 and 1887 extended the exclusionary voting provisions to town and city offices.

159. In 1871 and 1875, the territorial assembly made it a

crime to establish a voting precinct on any Indian reservation, agency or trading post.

160. In 1867 and 1873, the territorial assembly passed legislation limiting service on grand juries and trial juries to white citizen taxpayers.

161. From the late 1800's to approximately 1930, the United States actively pursued a policy of assimilating the Indians.

162. Between 1865-1868, the United States negotiated several treaties and agreements with the Blackfeet, Assiniboine and Gros Ventre Indians in Montana which reduced the Indians land base.

163. In a series of acts and executive orders issued from 1873-1896, the United States Congress and the President reduced the land base of the Blackfeet Indians by establishing the Blackfeet, Fort Belknap and Fort Peck Reservations.

164. In 1887, Congress passed the Dawes Act authorizing, inter alia, the sale of reservation land to individual residents.

(iii) Statehood

165. In 1889, Montana adopted its first Constitution. The Constitution excluded Indians from participating in the political process by limiting the right to vote to male citizens.

166. Between 1903 and 1921, the legislature adopted a number of resolutions seeking to have the Flathead Reservation, Fort Peck Reservation, Blackfeet Reservation and Fort Belknap Reservation opened for settlement.

167. Between 1903 and 1951, the legislature passed laws prohibiting Indians from carrying firearms outside a reservations, and prohibited the sale of intoxicating liquors to Indians. The legislature did not repeal the law prohibiting Indians from carrying firearms or buying liquor until 1953.

168. Between 1891-1919, the State adopted a number of voting laws that denied or restricted the ability of Indians to participate in the political process, i.e., limiting the right to vote in school elections to male citizen taxpayers and female citizens; limiting the right to vote for school trustees to citizens; limiting persons permitted to vote for road districts to "qualified electors" that are "taxpayers;" excluding any person living upon an Indian reservation from being a

resident for purposes of State elections; and prohibiting the establishment of a voting precinct at an Indian agency or trading post.

169. The "taxpayer" requirement for voting, which had a disparate impact on Indians, was not repealed until 1971.

170. In 1953, Congress passed legislation giving certain States criminal and civil jurisdiction over Indian reservations, and authorizing all other States, at their option, to assume similar jurisdiction.

171. In 1963, Montana assumed criminal jurisdiction over the Flathead Indian Reservation.

b. Lingering Effects of Discrimination

172. Indians continue to bear the effects of past discrimination in such areas as education, employment and health, which, in turn, impacts upon their ability to participate effectively in the political process.

(i) Socio-economic Status of American Indians

173. The 1990 census figures reveal the socio-economic status of American Indians in Montana remains depressed as compared to whites residing in Montana.

174. In 1990, 14% of whites in the State had incomes below the poverty line, while 46% of American Indians had incomes below the poverty line.

175. In 1990, the per capita income for whites in the State was $11,634, the per capita income for American Indians was $5,422.

176. In 1990, 6% of whites 16 years and over were unemployed, while 26% of American Indians were unemployed.

177. In 1990, 18.3% of whites 25 years and over did not have a high school degree, while 31 9'1/0 of American Indians did not have a high school degree.

178. In 1990, 5.9% of whites 25 years and over had a graduate or professional degree, while 2.2% of American Indians had a graduate or professional degree.

179. In 1990, 11% of the white families were female-headed households with no husband present, while 32.5% of American Indian families were female-headed household with o husband present.

180. In 1990, 7.4% of the white families were female-headed households with no husband present and with children under 18 years, while 22.8% of American Indian families were female headed households with no husband present and with children under 18 years.

181. In 1990, 6.3% of the white occupied housing units in the State had no vehicles available, while 14.4% of American Indian occupied housing units had no vehicles.

182. In 1990,31.6% of the renter occupied housing units in the State were occupied by whites, while 51.5% were occupied by American Indians.

183. According to the 1996 Vital Statistics maintained by the Montana Department of Public Health and Human Services, the median age of Indians at death is 61. The median age at death of whites is 77.

184. In 1994, the unemployment rate on Indian Reservations was approximately 40%, compared to a statewide unemployment rate of 7%.

(ii) Impact on Political Participation by American Indians

185. Both expert and lay witnesses testified that there is a causal connection between the depressed socio-economic status of American Indians and their level of political participation.

186. Plaintiff Whitehead testified that "historic discrimination low socio-economic status , and discrimination in the election process has resulted in low [voter] turn-outs and low rates of [Indian] registration. "

187. Dr. Heidenreich testified that Indians continue to bear the effects of discrimination , which include "low participation [and] . . . low voter turn-out on the part of Indians [and] . . . very few [Indian] candidates.

188. Despite the effects of past discrimination, American Indians have held significant positions in the Democratic party and State government.

189. Plaintiff Juneau has been active in the Democratic Party in Glacier County for many years, and serves on the State Executive Board for the Democratic Party.

190. Plaintiff McDonald has served on the Governor's Task Force to Renew Montana Government.

191. Plaintiff Whitehead has served as representative for

House District 98, and is a member of the State Executive Board for the Democratic Party.

192. Plaintiff Old Person has addressed the State legislature on numerous occasions as the official spokesperson for the State of the Indian Address.

c. Racial Appeal

193. Campaigns in the challenged House Districts have occasionally been subject to overt or subtle racial appeals. Plaintiffs presented evidence of two such campaigns.

194. When plaintiff MacDonald ran for the State House in 1982, his opponent ran radio ads stating that MacDonald was a cousin of Bearhead Swaney, a person known in Lake County to be an outspoken, aggressive advocate for Indian interests. The ads also claimed, wrongly, that MacDonald did not pay property taxes.

195. When Jeannine Padilla ran for the school board in 1993 in Ronan, Montana, her opponent made a point at a pre-election forum of saying "he wasn't running just to represent a specific group." Padilla believed her opponent deliberately interjected race as an issue in the election.

d. Extent of Racially Polarized Elections

196. As discussed above, Dr. Zax conducted BERA analyses on 257 statewide elections that occurred in the eight challenged House Districts during years 1994 and 1996. The elections consisted of general elections, retention elections and ballot issues. Of the 108 elections held in 1994, 17 (approximately 16%) were racially polarized. Of the 149 elections held in 1996, 41 (approximately 28%) were racially polarized.

As discussed above, Dr. Zax also conducted BERA analyses on 12 primary elections and 15 general elections, held between 1988 and 1996, wherein an Indian candidate opposed a white candidate for a position in State, federal or county government. Of the 12 primary elections, 6 (50%) were racially polarized. Of the 15 general elections, 12 (80%) were racially polarized.

e. Size of Election Districts

197. Many of the House Districts in Montana are large in size because Montana is a large State with a small, widely dispersed, population. The eight challenged House Districts are not unusually large in comparison to the other House Districts in the State.

f. Candidate Slating Process

198. There is no slating process in Montana, and there is no allegation that American Indians have been denied the opportunity to run for public offices.

g. Extent to Which Minority Members Have Been Elected

199. A limited number of American Indians have been elected to public office in Montana. Most American Indians are elected in jurisdictions that are majority American Indian, such as House District 85, which includes the Blackfeet Reservation, and House District 98, which includes the Fort Peck Reservation.

200. For almost 40 years, Democratic candidates of American Indian heritage have regularly won election to the Montana legislature from the House District containing substantial portions of the Blackfeet Reservation in Glacier County. with only two exceptions, every legislature since 1957 has included a representative or senator of American Indian heritage from the Blackfeet Reservation in Glacier County. In the 1994 general election, both the Democratic and Republican candidates for House District 85 were Blackfeet tribal members. American Indians have also been elected to county and local offices, including county commissioner, sheriff and school board. Many election judges in Glacier County are American Indian.

201. The 1997 Montana legislature had four representatives of American Indian heritage; (1) plaintiff Bill Whitehead, Democrat from House District 98, which includes part of the Fort Peck Indian Reservation; (2) George Heavy Runner, Democrat from House District 85, which

includes part of the Blackfeet Indian Reservation; (3) Gerald Pease, Democrat from House District 6, which includes part of the Crow Reservation; and (4) Jay Stovall, Republican from House District 16, a majority white district located south of Billings.

202. American Indian candidates fail to win elections for a variety of reasons, including partisan politics and low Indian voter turn-out.

203. Most American Indians are Democrats. Accordingly, most American Indian candidates run on the Democratic ticket. If an American Indian runs for office as a Republican in a majority Indian district, the candidate is generally not the Indian preferred candidate, and will find it difficult to prevail. Conversely, if an American Indian candidate runs as a Democrat in a strong Republican House District, such as House District 73 which includes Lake County, it will be difficult for the American Indian candidate to prevail.

204. In the 1996 general election in House District 85, a majority Indian district which includes the Blackfeet Reservation, the American Indian voter turn-out was approximately 48 percent, compared to a 70 percent turn-out for non-Indian voters.

205. In the 1996 general election in House District 98, a majority Indian House District which includes the Fort Peck Indian Reservation, more non-Indians than Indians turned out to vote.

206. In the 1994 and 1996 general elections in House District 92, a majority Indian House District which includes the Rocky Boy Reservation, the voter turn-out in the majority Indian precincts in Hill County was below the county average.

h. Responsiveness of Elected Officials to Minority Needs

207. In recent years, the State of Montana has been responsive to the needs and concerns of American Indians.

208. The Governor appoints an Indian Affairs Coordinator from a list of nominees submitted by tribal leaders.

209. The Montana State Legislature has a joint, bipartisan, Indian Affairs Committee. Senator Nelson, an Indian preferred senator from Senate District 49, has served on that committee since 1994. The function of the committee is to educate the legislators about the needs and concerns of Indians, and sponsor legislation beneficial to Indians. Senator Nelson described several pieces of legislation designed to address Indian needs and concerns in the areas of education, water rights settlements, and funding for cultural projects.

210. American Indians have been a reasonably successful interest group in the recent .history .Recent legislation has created, *inter alia*, a minority achievement position to improve enrollment and retention rates of Indians in higher education, and water rights compacts between the State and the tribes.

211. The State of Montana provides assistance to tribal governments on various matters such as natural resource development, tax revenue sharing and welfare reform.

212. State law authorizes the waiver of certain fees for higher education for students who are at least one-quarter American Indian. The State also provides counseling to assist minority students in higher education institutions.

213. Montana has a program to assist American Indians with the federally mandated welfare reform. Before federal welfare reform was enacted, the State conducted more than 30 meetings at Indian reservations to discuss welfare reform. The last State legislature appropriated $308,000 per year for welfare reform transition on Indian reservations. These monies are used to fund information, community advisory councils and tribal family assistance plans. Jon Meredith, the tribal transition specialist, works with each tribal government to implement a transition plan tailored to the needs of the tribe.

214. The Montana Department of Transportation ("MDOT") respects the sovereignty of the Tribes and requires contractors to comply with applicable tribal laws. The MDOT staff members that work with tribal governments are trained in cultural diversity issues and Indian law. The MDOT has an affirmative action program that includes certification of disadvantaged business enterprises on the reservations, and training for American Indians on skills

needed for highway construction. The State of Montana has agreements with each reservation except the Flathead for sharing of gasoline tax revenues.

i. Whether the Challenged Voting Procedure is Tenuous

215. Montana's districting policies are not tenuous. In a State as large as Montana, the requirement of compact and contiguous single member district has practical value in facilitating communication between constituents and legislators.

j. Proportionality

216. According to the 1990 census, American Indians constituted approximately 4.8% of the voting age population.

217. Under the 1992 redistricting plan, there are five majority Indian House Districts, and one majority Indian Senate District.

218. The six majority Indian legislative districts constitute 4% of the 150 legislative districts in the State.

219. The five majority House Districts constitute 5% of the 100 House Districts in the State.

220. The one majority Indian Senate District constitutes 2% of the 50 Senate Districts in the State.

221. Based upon the these figures, the court finds the 1992 redistricting plan provides American Indians with slightly more than proportional representation in the House, approximately 50% of proportional representation in the Senate, and slightly less than proportional representation if the House and Senate are considered together.

J. Comments Made by the Commissioners During the Meetings Held in Advance of the Regional Hearings

222. The transcripts of the Commissioners' pre-hearing meetings contain hundreds of pages of serious discussions on numerous topics, including schedules for subsequent hearings, the propriety of proposed redistricting plans, the requirements of the Voting Rights Act, and the mandatory and discretionary redistricting criteria. Also included in the transcripts are comments made by Commissioners which,

plaintiffs contend, are indicative of an intent to discriminate against Indians by diluting their voting strength. The comments at issue are described below.

a. Meeting in Kalispell

223. The transcript of the meeting in Kalispell on the afternoon of April 3, 1992, is approximately 40 pages long. The transcript reflects a discussion of the schedule for hearings, alternative redistricting plans for Missoula and Ravalli Counties, districting criteria, and the Voting Rights Act. In their discussion of the Voting Rights Act, the Commissioners joked about the classes of persons protected by section 2. Plaintiffs contend the following statements by Commissioners Pinsoneault, Rehberg and Frisbee concerning the classes of persons protected by the Voting Rights Act. reflect a negative attitude toward the Voting Rights Act by the Commissioners.

> "How about the French, I'm French?" Commissioner Rehberg replied, "How about Republicans?" Accordingly Commissioner Frisbee, "We're a minority, right?" "And men?" asked Commissioner Rehberg amid general laughter, "How about men?"

In context, this was a moment of levity in a serious meeting.

b. Meeting in Anaconda

224. The transcript of the Commission meeting in Anaconda on the afternoon of May 15, 1992, is approximately 80 pages long. The transcript reflects a discussion of the schedule for subsequent hearings, and discussion of numerous redistricting proposals. Included in the transcript were the following comments which plaintiffs rely upon as evidence of the Commissioner's intent to discriminate against Indians.

225. When the subject of the upcoming hearing in Hardin was discussed, Commissioner Pasma groaned,

> "God, Ruegemer brothers will be there. You'll only let that happen once. Just once, never do it again." Commissioners Frisbee and Rehberg added that "[o]ne of the Reugemers is. ..part of that lawsuit.

Lawsuit, right, yea, with the Crows. "

James Reugamer, the object of Commissioner Pasma's comment, was a member of the Big Horn County Commission who joined Indian plaintiffs in their successful suit challenging at-large elections for the Big Horn County Commission.

226. During the meeting in Anaconda, Fox advised the Commission that the Rocky Boy and Fort Belknap Reservations had proposed combining the two reservations into a single House District. In response, Commissioner Pasma stated:

> "[t]he very first line of this [proposal] absolutely infuriates me. The American Civil Liberties Union, what the hell do they have to say about what we do at Rocky Boy or Fort Belknap or anything else." Commissioner Pinsoneault gave encouragement to Commissioner Pasma. "Give 'em hell," he said. "Give 'em hell there, Jim," added Commissioner Rehberg, "[w]e're all applauding under the table."

227. During the meeting in Anaconda, Commissioner Pasma made the following comment concerning William Cooper, the ACLU demographer who drafted the Rocky Boy-Fort Belknap-Fort Peck Plan.

> "Some jackass from Virginia [who] comes out and tells me, that's a good idea.' Well, I can tell you one person he's going to have a hell of an argument from. I've been out there messing around and working with those people at Rocky Boy while that S.O.B. was still messing in his knickers and it just irritates me to have him come out from God-knows-where and put this on us. . . . If I go out there and speak to that Tribal Council, that bugger better not even show up for the meeting. I'll toss him in the trees someplace."

228. During the meeting Anaconda, Fox distributed the Rocky Boy-Fort Belknap-Fort Peck proposal to Commissioners to review. Fox inadvertently gave some of the Commissioners blank pieces of paper. In response, Commissioner Pinsoneault said:

> "I got a blank one too . . . .This is typical of them Indians the way they come. . .."

Shortly thereafter, Fox advised the Commissioners that she

had made the copies and was responsible for the blank pages.

229. During the meeting in Anaconda, Commissioner Frisbee joked that all Indians should be placed in one district.

> Frisbee: . . .we'd start down here in the Crow going down. . .
>
> Pasma: Well, they did it in North Carolina? Remember that map we had?
>
> Rehberg: . . . give them one District and we go from there.

230. Commissioner Pasma and Frisbee had the following conversation concerning Frisbee's membership in the Blackfeet Tribe. Plaintiffs contend the conversation was intended as a condescending joke about Indians.

> Pasma: How are you doing Sheldon?
>
> Frisbee: Well, I'm a member of the Tribe. Yeah, I'm a member of the Tribe.
>
> Pasma: Yeah, you're kidding about. . .
>
> Frisbee: And I'm not Indian, you know.
>
> Pasma: Oh, I see.
>
> Frisbee: My name is Raising Wolf, Maquiapons.
>
> Pasma: Is that right?
>
> Frisbee: Any time you run for office up there, you've got to be a member of the Tribes.
>
> Pasma: Oh!
>
> Frisbee: Hugo Erinson [sic], for example, was Awakemau, All Wise.

At trial, Commissioner Frisbee explained that his statement about being a member of a tribe and having a tribal name was not a joke as claimed by plaintiffs. He described the ceremony in which he was given his tribal name.

c. Meeting in Shelby

231. The transcript of the Commission meeting in Shelby on the afternoon of June 24, 1992, is approximately 90 pages long. The transcript reflects a serious discussion of numerous redistricting proposals. Plaintiffs rely on the following statements made during this meeting as I evidence of a discriminatory intent by the Commissioners.

232. During the meeting in Shelby, the Commissioners discussed various proposals for Glacier County. Under one

proposal, Plan 200, predominately white East Glacier would be included in a majority Indian House District. Commissioner Frisbee objected stating that the proposal would "emasculate a few more white voters."

233. Later, Commissioner Frisbee asked if the Blackfeet and Confederate Salish and Kootenai Tribes had more detailed information on whether the House District 85 proposed by the tribes would split the city of Cut Bank. When Fox said she had received more detailed information and could reproduce the plan on her computer, Commissioner Frisbee replied "[w]ell, don't do it as far as I'm concerned."

234. During the meeting, the Commissioners discussed the tribes' proposal for House District 92 encompassing the Rocky Boy Reservation and the Fort Belknap Reservation. Commissioner Frisbee stated "[w]ell that's just as idiotic as the other. Maybe even more so."

Frisbee further expressed hope that Indians residing on the Fort Belknap and Rocky Boy Tribes Reservations would appear at the Commission hearing in Shelby and oppose the ACLU's proposal to combine the Rocky Boy Reservation and the Fort Belknap Reservation in a single House District --- "I would hope that they have all sorts of testimony that the two don't belong together cause that would shoot that ACLU plan right in half."

235. With respect to the Rocky Boy- Fort Belknap Fort Peck proposal, Commissioner Pasma commented that the Rocky Boy Reservation and the Fort Belknap Reservation "should not be in the same district", and combining the would violate "Commission criteria." He further state that combining Rocky Boy and Fort Belknap in the same House District was "a bunch of crap", and that he might go along with creating a House District combining the two tribes if the tribal leadership supported it, but that he was not "going to do it for some dingaling from Virginia telling me it's a good idea for Belknap and Rocky Boy."

236. When Commissioner Pinsoneault asked whether anyone was going to explain the tribal proposals at the evening hearing, the following exchange occurred.

> Frisbee: Well somebody showed me a registration here showing that Jeff Renz was...going to be here.

Jeffrey I guess.
Pinsoneault: Who's that?
Frisbee: He's the ACLU.
Pasma: Oh, is he from Montana?
Pinsoneault: That damned director of the ACLU.

237. It is imperative to note that the number of comments set forth above, and relied upon by plaintiffs as showing a discriminatory intent by the Commissioners, were made as the Commissioners were considering proposals to combine the Rocky boy and Fort Belknap Reservation in a majority Indian House District. Because the Commission ultimately created a majority Indian House District encompassing these Indian reservations, the acts of the Commission speak louder than the inappropriate comments which were critical of the ACLU and the proposal to combine the Rocky Boy and Fort Belknap Reservations in a single House District.

d. Meeting in Wolf Point

238. The transcript of the Commission meeting in Wolf Point on July 22, 1992, is approximately 90 pages in length. The transcript reflects a discussion of numerous redistricting proposals. During the meeting, Commissioner Pasma stated that he supported the plan to put Rocky Boy and Fort Belknap in separate House Districts, because the tribes' proposed House District 92 would dilute a strong Democratic House District in Northern Havre, and lead to the removal of a distinguished democratic legislator. Plaintiffs contend the foregoing statement by Commissioner Pasma shows that Commissioner Pasma rejected the proposed majority Indian House District 92 because he wished to protect his political party and a white Democratic incumbent legislator.

> I have to do something I find unpleasant. I have to take off the hat of the Commissioner of Reapportionment and put on the hat of the County [Democratic] Chairman. . . .We are being asked now to combine the two [reservations] together. . . .When this Commission was founded, it was my understanding, it was founded through the auspices of the Constitution of the State of Montana, not to the ACLU. . . . It is going to completely dilute the

> strongly Democratic district of northern Havre. . . . The ACLU plan will remove from office the most distinguished legislator of the State of Montana. . . . I've heard nothing but complaining by the Rocky Boys against the Gros Ventre and the Gros Ventre against Rocky Boys. Now we are told that they can't hardly love each other enough. Everybody gets along good.

Although Commissioner Pasma voted against the proposed majority Indian House District 92, the Commission ultimately created a majority Indian House District which included both the Rocky Boy and Fort Belknap Indian Reservations.

e. Meeting in Hardin

239. The transcript of the Commission's afternoon meeting in Hardin on July 24, 1992, is approximately 70 pages in length. The transcript reflects a discussion of various districting proposals for southeastern Montana. During the meeting, Commissioner Pasma and Jeffrey Renz discussed the ACLU'S proposed majority Indian district in southeast Montana. Plaintiffs rely upon the following statement by Commissioner Pasma , as showing a discriminatory intent.

> The plan to split Rosebud County five times "gives me fits," Pasa said. "You're the guy that's all so hot on civil rights, let's have some civil rights for everybody, everybody, regardless of their skin."

Although the Commission did not adopt the plan supported by Renz, it did create two majority Indian House districts and one majority Indian Senate district in southeast Montana. The legislative districts created by the 1992 Commission in southeast Montana are not challenged by the plaintiffs in this action.

240. To the extent the preceding Findings of Fact may be deemed Conclusive of Law, they are hereby incorporated by reference in the Conclusions of Law.

CONCLUSION OF LAW

To the extent the following Conclusions of Law may be deemed to Be Findings of Fact, they are hereby incorporated by reference into the Findings of Fact.

A. Jurisdiction

1. The court has subject matter jurisdiction over this voting rights action pursuant to 42 U.S.C. § 1973 and 28 U.S.C. §§ 1331, 1343(a)(3) and (4). Although the Complaint challenges statewide redistricting, a three-judge court is not required by 28 U.S.C. § 2284 (a) because the claims advanced by the plaintiffs are premised solely upon a federal statute *i.e.*, section 2 of the Voting Rights Act of 1965,42 U.S.C. § 1973(a).

B. Standing

2. Except for plaintiff Andrea Brockie (now Andrea Main), each of the plaintiffs has standing to challenge the legislative districting in Montana. Main currently resides in Missoula, having moved there in July 1996. No claim is made that her present residence should be included in a majority Indian district. Accordingly, she has no standing to advance a claim under section 2 of the Voting Rights Act. *See, United States v. Hays*, 515 U.S. 737, 745 (1995).

C. The Voting Rights Act

3. Section 2, as amended in 1982, prohibits any standard, practice or procedure "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [of the Act]. . . ." *See*, 42 U.S.C. § 1973(a).

Section 4(f)(2) provides that

> [n]o voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority I group.

See, 42 U.S.C. § 1973b(f)(2).

4. Section 1973aa-la(e) of Title 42 specifically identifies American Indians as a language minority group for purposes of the Voting Rights Act. See, 42 U.S.C. § 1973aa-1a(e).

5. A denial or abridgement of the right to vote is established when "based upon the totality of circumstances, it is shown that the political processes leading to nomination or election . . .are not equally open to participation by all members of a [protected] class of citizens. . .in that its members have less opportunity than others members of the electorate to participate in the political process and to elect representatives of their choice." *See*, 42 U.S.C. § 1973(b).

6. While section 2 does not provide an assurance of success at the polls for minority preferred candidates, it does provide an assurance of fairness. *Johnson v. De Grandy*, 512 U.S. 997, 1014 (1994). The essence of a section 2 claim is that an "electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S, 30, 47 (1986).

7. A legislative redistricting plan may violate section 2 of the Voting Act in two distinct ways. First, a violation occurs if a redistricting plan was enacted or maintained for the purpose of discriminating against a protected minority. Second, a violation of section 2 occurs if the redistricting plan has a discriminatory effect upon a protected minority. *See*, *Garza V. County of Los Angeles*, 918 F.2d 763,766 (9th Cir. 1990) ("after the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes"); Lucas v. Townsend, 967 F.2d 549, 556 (11th Cir. 1992) ("[u]nder Section 2 . . . plaintiffs may prevail by proving either discriminatory effect or intent"); *See also, Askew v. City of Rome*, 127 F.3d 1355, 1373 (11th Cir.1997) ; *Brown v. Board of Commissioners of Chattanooga*, Tenn., 722 F. Supp. 380, 385 (E.D. Tenn. 1989).

a. The Discriminatory Purpose Analysis

8. The standard of proof required for determining a discriminatory purpose under section 2 has been defined as the same standard used in resolving cases under the Fourteenth Amendment's Equal Protection Clause. *Garza v. County of Los Angels*, 756 F.Supp. 1298, 1349 (C.D. Cal. 1991); *Brown v. Board of Commissioners of Chattanooga, Tenn.*, 722 F.Supp 380, 385 (E.D. Tenn. 1989).

9. Plaintiffs are not required to prove that a discriminatory purpose was the sole dominant, or even the primary reason for the challenged practice, but only that it was a motivating factor for the challenged practice. *Askew v. City of Rome*, 127F.3d 1355,1373 (11th. Cir. 1997), *citing*, H.Rep. No.227, 97th Cong., 1st. Sess., at 30, n. 101 (1982).

10. A discriminatory purpose may be established through direct or indirect circumstantial evidence, including the normal inferences to be drawn from the defendants' actions. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

11. Factors that may be probative of a discriminatory purpose include: (1) whether the impact of the actions of the redistricting Commission bear more heavily on Indians than whites; (2) the historical background of redistricting in the State, particularly if it reveals a series of official actions taken for invidious purposes; (3) the sequence of events leading up to the challenged redistricting plan; (4) whether the Commission departed from the normal redistricting procedures; (5) whether the Commission applied the State's substantive redistricting criteria in a manner that discriminated against Indians; and (6) contemporaneous statements made by members of the redistricting Commission. *See, Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265-67 (1977).

12. The United States Supreme Court has not yet had an opportunity to determine whether evidence of a discriminatory effect is a necessary component under the discriminatory purpose prong of section 2. Lower courts that have addressed this issue are not in accord. Some courts are of the opinion that a showing of discriminatory effect is not necessary under the purpose prong of section 2. *See, Askew v. City of Rome, supra,* 127 F.3d at 1373. Conversely, other courts have held that "some quantum" of effect is required to prove a violation of the purpose prong of section 2. *See,*

Brown v. Board of Commissioners of Chattanooga, Tenn., supra, 722 F. Supp. 380, 389 (E.D. Tenn. 1989).

13. In the case *sub judice*, plaintiffs contend the 1992 redistricting plan was created under a discriminatory purpose to dilute the voting strength of American Indians. In support of their position, plaintiffs relay heavily upon excerpts from the minutes of the regional hearings and meetings the 1992 Redistricting Commission, which purport to show the Commission's disdain for Indians, and evidence that state and federal government discriminated against American Indians in voting and other areas of life prior to 1971.

14. Having considered the evidence, the court concluded that the 1992 Commission did not purposefully intend to discriminate against American Indians.

15. The impact of the actions of the Commission do not bear more heavily on Indians than whites. The Commission did not depart from normal redistricting procedures, and the Commission did not apply the State's substantive redistricting criteria in a manner that discriminated against American Indians.

16. While the official minutes of the regional hearings and meetings of the Commission provide evidence of the Commission's distrust of the ACLU and the ACLU demographer, William Cooper, they do not contain persuasive evidence of racial animus toward American Indians.

17. Finally, while American Indians experienced official discrimination in voting until 1971, there is no evidence that this past discrimination caused the 1992 Commission to discriminate against American Indians when drafting the 1992 redistricting plan

b. The Discriminatory Effect Analysis

18. To prove a violation of the discriminatory effect prong of section 2, plaintiffs must first establish, by a preponderance of the evidence, the following three threshold conditions commonly referred to as the "Gingles factors". First, plaintiffs must prove they a re part of a minority group that is sufficiently large and geographically compact to constitute a majority of the voting age population in one or more additional single member districts.

Second, they must show the minority group is politically cohesive, *i.e.*, the minority group I tends to vote in a bloc. If the minority group is not politically cohesive, it cannot be said the challenged electoral structure thwarts distinctive interests of the minority group.

Third, plaintiffs must demonstrate the white majority votes sufficiently as a block to enable it --in the absence of special circumstances, such as the minority candidate running unopposed --to defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30,50-51 (1986); *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (extending the *Gingles* factors to single-member districting plans).

19. Both the second and third *Gingles* factors require the court to consider the voting behavior of different races. However, the inquiry under the second factor differs from that involved in the third: the former asks merely whether voters of the same race tend to vote alike, and the latter evaluates whether a bloc-voting majority routinely outvotes the minority, thereby "impair[ing] the ability of a protected class to elect its candidate of choice." *Johnson v. DeGrandy*, 512 U.S. 997, I 1007 (1994). .

20. If these *Gingles* factors are not present, the challenged electoral practice cannot be considered as a cause of the minorities' inability to elect its preferred candidates. *Sanchez v. Bond*, 875 F.2d 1488, 1492 (l0th Cir. 1989).

21. Failure to establish anyone of the *Gingles* factors precludes the finding of a section 2 violation. *Growe v. Emison*, 507 U.S. 25,40-41 (1993).

22. If the three *Gingles* factors are established, the court then undertakes to determine whether, based upon the totality of the circumstances, the challenged electoral practice causes the minority group to have "less opportunity than other members of the electorate to participate in the .political process and elect representatives of their own choice." *Magnolia Bar Association. Inc. v Lee*, 994 F.2d 1143, 1146 (5th Cir. 1993).

(i) First Gingles Factor --Sufficiently Large and Geographically Compact

23. The phrase "sufficiently large and geographically compact" is not defined in the Voting Rights Act. Courts have held a minority group is sufficiently large if it can constitute a

majority in one or more single member districts. *See*, *Houston v. Lafayette County Miss.*, 56 F.3d 606,611 (5th Cir. 1995).

24. The phrase "geographically compact" focuses on the compactness of the minority voter population, not the geographic compactness or shape of the districts proposed by the minority. *See, Sanchez v. State of Colo.*, 97 F.3d 1303,1312 (l0th Cir. 1996); Gomez v. City of. Watsonville, .863 F.2d 1407, 1412-14 (9th Cir. 1988). Stated another way, the court must determine whether the .voting age population of the minority is diffused and politically ineffective, not whether the area by which it is bound is geographically dense. *Sanchez, supra*, 97 F.3d at 1312.

25. The reason that a minority group making a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: "[u]nless minority voters possess the potential to elect representatives, in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." Gingles, 478 U.S. at 50, n.17. As a collary, if the minority group is small and dispersed, no single member district could be created to remedy its grievance. *Sanchez v. State of Colo.*, 97 F.3d 1303, 1311 (l0th Cir. 1996).

26. In the present case, the court finds American Indians residing on or near the Rocky Boy, Fort Belknap and Fort Peck Reservations are not sufficiently compact to create an additional majority Indian Senate District in northeast Montana. The Senate District 46 proposed by the plaintiffs in this area (combing plaintiffs' proposed House Districts 92 and 98) uses a long, nearly uninhabited land bridge to link populations of American Indians on the Rocky Boy and Fort Belknap Reservations with Americans on the Fort Peck Reservation, approximately 100 miles away. Such a configuration is not reasonably compact, fails to contain adequate transportation routes, fails to respect local government boundaries and communities of interest, and can only be explained as a racial gerrymander.

27. Turning to the American Indians residing on the Blackfeet and Flathead Indian Reservations, the court finds they are sufficiently large and geographically compact to constitute a majority in an additional single member House

District and Senate District. An additional reasonably compact and regular House District (*i.e.*, plaintiffs' proposed HD 73), can be created which includes portions of Flathead, Lake, Glacier and Pondera Counties, and major portions of the Blackfeet and Flathead Indian Reservations. Likewise, proposed House District 73 can be combined with a reconfigured House District 85 to form a reasonably compact and regular Senate District.

28. In the existing House District 85, American Indians constitute 66% of the voting age population. Plaintiffs have demonstrated that House District 85 and House District 73 can be reconfigured so that American Indians would constitute 57% of the voting age population in each House District and, when combined, would create a reasonably compact Senate District wherein American Indians constitute 55% of the voting age population.

29. Proposed House Districts 73 and 85, and the proposed Senate District which includes proposed House Districts 73 and 85, are not materially different in shape from other districts adopted by the 1992 Commission.

(ii) The Second Gingles Factor – Political Cohesiveness of the Minority Group

30. In determining political cohesiveness, the inquiry is essentially whether the minority group has expressed clear political preferences that are distinct from the majority. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988). One way to ascertain the existence of political cohesiveness, is to determine the extent of racially polarized voting. *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

31. The Supreme Court has not identified a precise mathematical or percentage formula for determining whether an election is racially polarized. Instead, the Court stated that "racial polarization or bloc voting exists where there is a consistent relationship between the race of the voter and the way in which the voter votes. . .or, to put it differently, where [voters of different races] vote differently." *Sanchez v. State of Colorado*, 97 F.3d 1303, 1312 (10th Cir. 1966), *quoting*, *Gingles*, 478 U.S. at 53, n.21.

32. Political cohesion and racially polarized voting are proved through statistical voting analyses such as bivariate

ecological regression analysis ("BERA") and homogenous precinct analysis, and competent lay testimony. *See, Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987); *Sanchez v. Bond*, 875 F.2d 1488, 1493-94 (10th Cir. 1989); *Sanchez v. Bond*, 875 F2d 1488, 1494 (10th Cir. 1989); *Sanchez v. State of Colo.*" 97 F.3d 1303, 1320 (10th Cir. 1996).

33. In the present case, the court need not determine whether American Indians are politically cohesive because the defendants stipulated that American Indians are sufficiently cohesive to satisfy the second *Gingles* factor. The statistical analysis conducted by Dr. Zax showed American Indians were politically cohesive in more than 70% of the general elections, retention elections and ballot issue elections he studied from the eight challenged House Districts. The statistical analysis conducted by Dr. Floyd showed American Indians were politically cohesive in more than 80% of the elections he studied where a white candidate opposed an American Indian candidate for a position in State, federal or county government. The anecdotal evidence presented by the parties showed American Indian voters usually vote as a bloc in support of candidates from the Democratic party.

(iii) The Third Gingles Factor --Whether the White Majority Votes Sufficiently as a Bloc to Usually Defeat the Minority Preferred Candidate

34. Under the third *Gingles* factor, the court evaluates whether a bloc voting majority usually outvotes the minority, thereby impairing the ability of the minority to elect its preferred candidate. *Johnson v. DeGrandy*, 512 U.S. 997, 1007 (1994).

35. Political cohesiveness with its racially polarized voting only becomes legally significant if a bloc voting white majority normally defeats the combined strength of minority votes plus white cross-over votes. *Thornburg v. Gingles*, 478 U.S. 30,56 (1986).

36. Proof of the third *Gingles* factor involves a two-prong analysis. First, the minority preferred candidate must be identified. *Valladolid v. City of National City*, 976 F.2d 1293, 1297 (9th Cir. 1992). Second, the court must study the voting patterns of whites in relation to the success or failure of the minority preferred candidate to determine whether whites vote

as a bloc to usual defeat the minority preferred candidate, *Gingles, supra*, 478 U. S. at 51.

37. The detennination of whether white bloc voting reaches this threshold is not subject to a simple doctrinal test, but will "vary according to a variety of factual circumstances." *Gingles, supra*, 478 U.S. at 57-58.

38. Courts have generally held that elections including both white and minority candidates provide the most probative evidence of vote dilution, because the elections generally present a candidate that is genuinely preferred by the minority. *See, Nipper v Smith*, 39 F.3d 1494, 1539 (11th Cir. 1994).

39. In the present case, plaintiffs failed to prove that legally significant white bloc voting exists in the eight challenged House Districts. Accordingly, the third *Gingles* factor is not satisfied. Because plaintiffs have failed to prove the third *Gingles* factor, they cannot prevail under the effect prong of section 2. However, to be thorough the court will continue its analysis.

D. Totality of the Circumstances --Senate Factors

40. When a court reviews the totality of the circumstances to determine whether the minority group has an equal opportunity to participate in the political process, it should look for the presence of the following probative factors identified in the Senate Judiciary Committee report accompanying the 1982 Amendment to section 2 of the Voting Rights Act. See , S.Rep. no.417, 97th. Cong. Sess. 28-29 (1982), *reprinted in*, 1982 U.S.C.C.A.N. 177, 206-07; *Johnson v. DeGrandy*, 512 U.S. 997,1010 (1994).

a) The extent of any history of official discrimination in the State adversely affecting the minority groups right to register to vote, vote, or otherwise participate in the democratic process;

b) The extent to which the State has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination against the minority group;

c) Whether a candidate slating process exists which may operate to deny members of the minority group equal access

to the ballot;

d) The extent to which members of the minority group in the State bear the effects of discrimination in areas such as education, employment and health, which hinder their ability to participate effectively in the political process;[2]

e) Whether political campaigns have been characterized by overt or subtle racial appeals;

f) The extent to which members of the minority group have been elected to public office in the State[3]; and

g) The extent to which voting in the elections of the State are racially polarized.

In addition to these Senate Factors, courts have also considered the following factors which may be probative of a section 2 violation:

a) Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the minority group;

b) Whether the policy underlying the State's use of the challenging voting standard, practice or procedure is tenuous; and

c) Whether the number of districts in which the minority voters form and effective majority, is roughly proportional to the minority voters respective share in the voting age population. *See, Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994); *Cuthair v. Montezuma-Cortez, et. al*, 7 F.Supp 1152, 1166 (D.Colo. 1998); *Barnett v. City of Chicago*, 141 F.3d 699, 703 (7th Cir. 1998).

41. In applying these factors, the court must keep certain additional consideration in mind. First, the above-described list of relevant factors is exemplary, not exclusive. Second,

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2. The lingering effects of past discrimination are relevant only if they continue to "hinder [the minority group's ability to participate effectively in the policatical process." See, S.Rep.No. 417, 97th Sess. At 29, U.S. Code Cong. & Admin. News 1982, p. 206.

3. although the extent to which members of a protected class have been elected to office in the State is one factor to be considered in determining whether a section 2 violation has occurred, the court must remain mindful that section 2 does not establish a right to have members of a protected class elected in numbers equal to their proportion in the populatioin. See, 42 U.S.C. § 1973(b).

there is no requirement that any particular number of factors be proved or that a majority of the factors point one way or another. Third, whether the political processes are equally open depend upon a searching practical evaluation of the past and present reality and upon a functional view of the political process. *Thornburg v. Gingles*, 478U.S. 30, 46 (1986). "In other words, scrutinizing electoral systems for Voting Rights Act violations is not an exact science." *Askew v. City of Rome,* 127 F.3d 1355, 1379 (11th Cir. 1997).

42. Considering the totality of the circumstances, the court finds there is some evidence which supports a section 2 violation. First, there is a history of official discrimination by State and federal governments against American Indians, which began in the 1860's and continued up to 1971. Second, American Indians continue to have a lower socio-economic status in Montana than whites, which necessarily hinders the American Indians' ability to participate in the political process. Third, statistical and ancedotal evidence reveals that racially polarized voting occurred in a majority of the primary and general electrons held in eight challenged House District, wherein a white candidate opposed an American Indian candidate for a position in county, state or federal government. Fourth, at least two recent elections in the challenged House Districts may have been subject to overt or subtle racial appeals.

43. On the other hand, there is significant evidence which supports a finding against a section 2 violation. First, Montana does not have unreasonably large election districts, anti-single shot provisions or other voting practices that enhance the opportunity for discrimination against American Indians. Second, Montana does not have a candidate slating process. Third, elected officials in Montana are generally responsive to the needs of American Indians. Fourth, the number of legislative districts in which American Indians form an effective majority is roughly proportional to the American Indians' respective share of the voting age population in Montana. Fifth, the number of House Districts in the 1997 legislature with representatives of American Indian heritage is roughly proportional to the American Indians' respective share of the voting age population in Montana.

44. Having considered all of the relevant factors, the court

concludes that the 1992 redistricting plan does not unlawfully dilute the voting strength of American Indians in violation of section 2 of the Voting Rights Act.

CONCLUSION

Therefore, for the reasons set forth herein, the court concludes that Judgment is appropriately entered in favor of the defendants with respect to the claims advanced in plaintiffs' Complaint.

IT IS SO ORDERED

DATED this 27TH day of October, 1998.

PAUL G. HATFIELD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Earl OLD PERSON; Carol Juneau; Joe MacDonald; Jeannine Padilla, Plaintiffs-Appellants,

v.

Bob BROWN, Secretary of State for the State of Montana; Judy Martz, Governor of the State of Montana, Defendants-Appellees.

No. 02-35171.

United States Court of Appeals,
Ninth Circuit.

Lauglin McDonald, American Civil Liberties Union, Atlanta, GA, for the plaintiffs-appellants.

Sarah A. Bond, Assistant Attorney General, Helena, MT, for the defendants- appellees.

Appeal from the United States District Court for the District of Montana, Philip M. Pro, District Judge, Presiding. D.C. No. CV-96-00004-PMP.

Before NOONAN, HAWKINS and GOULD, Circuit Judges.

ORDER

The panel, as constituted above, unanimously voted to deny the petition for panel rehearing. Judges Hawkins and Gould voted to deny the petition for rehearing en banc, and Judge Noonan so recommended.

The full court was advised of the petition for rehearing en banc. A judge of this court requested a vote on whether to rehear the matter en banc on issues including a separate mootness issue. Judge Hawkins voted to grant rehearing en banc on the mootness issue. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 20--ELECTIVE FRANCHISE
SUBCHAPTER I-A--ENFORCEMENT OF VOTING RIGHTS

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Supreme Court, U.S.
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No. 03-253

In The Supreme Court of the United States

EARL OLD PERSON, CAROL JUNEAU, JOE McDONALD, and JEANINE PADILLA,

Petitioners,

v.

BOB BROWN, Secretary of State for the State of Montana; and JUDY MARTZ, Governor for the State of Montana,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of Petitioners' concession that the case is moot, whether this Court should exercise its discretion under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994), to vacate the judgments of the courts below where: (1) Plaintiffs have thoroughly litigated this matter over seven years, including two bench trials with full appellate review in the court of appeals; (2) Plaintiffs waited some years into the ten-year legislative redistricting cycle before filing their Voting Rights Act challenge to the 1990 Montana legislative redistricting; (3) the case became moot after the court of appeals twice ruled on the merits of the Plaintiffs' claims, but before the petition for certiorari had been filed; (4) the court of appeals sua sponte ordered briefing on the issue of vacatur and declined to vacate the district court's judgment; and, (5) vacatur would disturb the orderly operation of the federal judicial system and impair the substantial public interest in sustaining precedent, avoiding waste of judicial resources, and promoting orderly development of the decisional law?

2. If the case is not moot, whether the Ninth Circuit Court of Appeals' unanimous decision correctly held that Plaintiffs failed to satisfy their burden of proof to show a violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973, either under the discriminatory intent or effect rules under *Thornburg v. Gingles*, 478 U.S. 30 (1986), where the record admittedly demonstrated that districts, one of the four challenged legislative districts had always elected an Indian-preferred candidate and two others had elected and re-elected Indian-preferred candidates under the challenged boundaries?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . "

42 U.S.C. § 1973

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) [language minority guarantees] of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, **based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) [language minorities] of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to**

> **have members of a protected class elected in numbers equal to their proportion in the population.**

(Emphasis added.)

28 U.S.C. § 2106.

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

In 1996, the Plaintiffs brought two section 2 Voting Rights Act claims, one alleging intentional discrimination, the second alleging dilutive effects arising from the boundaries of the 1990 Montana legislative redistricting in three separate and distinct regions in Montana. They sought as a remedy the creation of Indian majority districts in all regions. Each region is separated from the other by long distances. Plaintiffs withdrew their claims regarding the southeastern Montana area after discovering it was already districted into majority Indian House and Senate districts. (CR 84, 85.) The remaining two areas, the hi-line area in northeastern and northcentral Montana and Flathead/Blackfeet area in northcentral and northwestern Montana, went to trial in 1998.

All parties agree that the applicable test is the four-part test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), i.e., the Plaintiffs have the burden of proof to show the three threshold "Gingles factors:" that the minority group is sufficiently numerous and geographically compact so that creation of a minority/majority district is possible; the minority group usually votes cohesively as a bloc for the same candidate, and the white majority usually votes cohesively as a bloc to prevent the election of the minority preferred candidate. If Plaintiffs meet their burden to show all these three factors, then the Court is to proceed to an exacting scrutiny of all the actual and practical local circumstances of electoral politics in the areas in issue and determine if, from a review of the totality of circumstances, the Plaintiffs have shown that the minority group does not have an equal opportunity to elect the candidates of their choice. *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Whitcomb v. Chavis*, 403 U.S. 124, 149-60 (1971).

After a two-week trial in March of 1998, district court for the District of Montana, the Honorable Paul Hatfield presiding, issued a judgment, and extensive findings and conclusions, ruling on all counts for the Defendants. *Old Person v. Cooney*, CV 96-004-GF (D. Mont. 1998) (*Old Person, Hatfield* App. at 86a-174a). The district court did not dismiss the complaint, as Petitioners allege (Pet. for Cert. at 3). Plaintiffs offered heavily redacted versions of Commission hearings to show bias, but the entire transcripts revealed instead that the Commissioners believed racial districting to be inimical to a pluralistic democracy, rather than that they acted with intent to discriminate against Montana Indians. In fact, some Plaintiffs testified

that they did not believe Commission members intentionally discriminated against Indians (1998 Tr. 669:17-20), and that the Indian candidates sometimes lost elections for legitimate electoral reasons, *e.g.*, several Indians run against each other and split the vote (1998 Tr. 672:4-20) or because Indians did not come together to offer their best candidates (*e.g.*, 1998 Tr. 672:9-21). Commissioner Frisbee, who had lived on or near the Blackfeet Reservation all his life and had been inducted into the Tribe (1998 Tr. 1025-30), also believed that because of the well-documented historical enmity between the Flathead and the Blackfeet, they would not vote cohesively and were not within the same community of interest (Def. Ex. 515, 1998 Tr. of April, 1992 conference call). For that reason, as well as the significant geographical barrier presented by the Continental Divide in that area, the Commissioners had voted against the Flathead/Blackfeet District. (1998 Tr. at 1013:1-4; 1018:23 to 1019:23; 1071:11-21; 1072:23 to 1073:17; 1025:10 to 1030:7 and 1066:8-17; Def. Ex. 38 at 15; Ex. 515 at 2237.)

Only four Plaintiffs appealed and therefore four challenged legislative districts remained before the Court.[1] Old Person and Juneau, who lived on the Blackfeet Reservation and in Montana House District 85 and Senate District 43, appealed as to those districts; and MacDonald and Padilla, who both lived on the Flathead Reservation and in House District 73 and Senate District 37 appealed

[1] The Ninth Circuit stated that all eleven Plaintiffs appealed. (*Old Person I*, 230 F.3d at 1117, App. at 58a). This is simply an error. All Plaintiffs claimed to have appealed as to the Flathead/Blackfeet area only. Only four Plaintiffs live in that area, so only they had standing to appeal. (*See*, Applnts. Br. Mar. 8, 1999 at 2.)

as to their districts. The Plaintiffs who lived in the hi-line districts did not appeal. *Old Person*, *remand*, 182 F. Supp. 2d at 1003-5 (App. at 28a).

The Ninth Circuit affirmed the ruling that Plaintiffs had not shown intentional discrimination, ruling that evidence was presented on both sides of the issue, but that the district court had applied the correct legal test and its findings were not clearly erroneous. *Old Person v. Cooney* (*Old Person I*), 230 F.3d 1113, 1130 (9th Cir. 2000) (App. at 83a-84a). Judge Canby, writing for the Ninth Circuit, also ruled, however, that the district court calculation of white bloc voting had been incorrect, and that despite evidence of 25 to 30 percent white cross over voting in HD 73, white bloc voting had been established in the relevant areas under the *Gingles* test. The Court remanded the case for an application of the totality test, and a finding on the ultimate issue of vote dilution in the 1990 plan. *Old Person I*, 230 F.3d at 1130 (2000) (App. 84a, 85a).

In November 2001, the district court, the Honorable Judge Philip Pro presiding,[2] heard additional evidence of elections since the first trial, and also of the now ongoing regular decennial 2000 redistricting process. After a two-day trial on remand, Judge Pro ruled that the four remaining Plaintiffs only had standing to challenge the districts in which they resided, and therefore only four districts remained before the Court: *Old Person v. Brown*, (*Old Person*, *remand*), 182 F. Supp. 2d 1002, 1006 (D. Mont.

[2] Judge Hatfield died during the pendency of the appeal. Judge Molloy recused himself due to a conflict of interest, and Judge Pro, United States District Court judge for the district of Nevada, was appointed to preside over the remand proceedings.

2002) (App. at 32a); *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000); *Ruiz v. City of Santa Maria*, 160 F.3d 543 (9th Cir. 1998); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996); *United States v. Hays*, 515 U.S. 737 (1995). The district court applied the mandate of the Ninth Circuit to evaluate the totality factors and ruled against the Plaintiffs, noting that three of the four challenged districts had already elected Indian-preferred candidates. *Old Person, remand*, 182 F. Supp. 2d at 1015-1016 (App. 48a.) Judge Pro did not dismiss Petitioners' Complaint as Petitioners allege (Pet. at 5), but, rather, issued a carefully crafted opinion and ruling in Defendants favor.

Plaintiffs appealed again to the Ninth Circuit. The Ninth Circuit again affirmed the district court. *Old Person v. Brown*, 312 F.3d 1036 (9th Cir. 2002) (*Old Person II*). (App. at 25a.) Plaintiffs sought rehearing and rehearing en banc. Sua sponte, the Ninth Circuit ordered briefing on several procedural issues, including whether the case was moot and whether vacatur was appropriate under the doctrine of *United States v. Munsingwear*, 340 U.S. 36 (1950). (Resp't App. at 1-2.) Only after the parties fully briefed these issues did the Ninth Circuit panel unanimously vote to deny the petition for rehearing and the Court voted to deny the petition for rehearing en banc. On April 23, 2003, the Court issued an order so indicating. (App. at 148a-149a.) On May 1, 2003, the panel unanimously issued its mandate. In July 2003, litigation in Montana state court essentially challenging the 2000 plan that created additional Indian majority districts in the areas in dispute herein ended. On July 2, 2003, the Montana Secretary of State accepted the 2000 plan and ordered the election administrators in Montana to implement its district boundaries. There are no more

elections to be held under the 1990 plan and, therefore, as of the date the 2000 plan was filed and became law, challenge to the 1990 plan is moot. Petitioners, in their extension of time within which to file a petition for certiorari and in the Petition itself admitted the same. (Applic. for Ext. at 3; Pet. at 8.)

Petitioners have failed to prevail in any court since the inception of this case in 1996. They now invoke the power of this Court under 28 U.S.C. § 2106, under the reasoning discussed but not applied, in *United States v. Munsingwear*, 340 U.S. 36 (1950). That doctrine and the statute cited allow this Court to exercise its discretionary authority to direct the lower court to vacate the judgment as to the appealed portions of the case where review has been prevented "by happenstance" because the case has become moot while on appeal. The equitable doctrine is invoked and applied to mitigate the unfairness to a party whose right to review was prevented through the accident of mootness by happenstance.

SUMMARY OF THE ARGUMENT

1. As Petitioners concede, this challenge is moot. Petitioners no longer had standing to bring it upon the adoption in July of the regular 2000 redistricting plan that replaced the challenged 1990 plan. The Petition must be dismissed for want of jurisdiction. The 1990 district boundaries no longer exist, and the 1990 Commission that adopted the challenged districts no longer exists (in Montana, a new commission is created every ten years to perform the redistricting and each Commission is dissolved upon the filing of the plan. Mont. Const. art. V, § 14; Mont. Code Ann. § 5-1-111(3)). (*See, Old Person I*, 230 F.3d

at 1118, App. at 60a-61a.) Nor do the 1990 districts have any continuing legal effect. Because redistricting in Montana is performed by an ephemeral body solely existing for that purpose, each plan becomes moot upon adoption of the next plan by the new commission.

During the lengthy litigation below, the new 2000 Commission was appointed, created, and adopted a new decennial districting (*See*, *Old Person*, *remand*, 182 F. Supp. 2d at 1014, 1015, App. at 46a-47a) and, therefore, none of the Petitioners now have any cognizable interest in the 1990 plan. Article III, section 2 of the United States Constitution limits the judicial power of the federal courts to live cases or controversies, and this Court has consistently and necessarily held that a controversy must present a live case or controversy at all stages of the proceeding to satisfy the constitutional minimum requirement of a case or controversy upon which to act. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *United States v. Hays*, 515 U.S. 737, 742-43 (1995); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998).

2. The only question in light of the mootness, is whether the lower court judgments should be vacated, as Petitioners claim. As in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), however, Petitioners here have shown no exceptional circumstances entitling them to an order that the lower court judgment be vacated. The public interest in finality of judgments weighs strongly against such vacatur, especially here where Petitioners have not only had their day, indeed years in court, but the public interest in precedential stability in this volatile area of law is quite high and Petitioners have advanced no specific reasons why vacatur is required to prevent injustice. It

would be fundamentally unfair to vacate the lower court judgment just because the Petitioners had the resources to continue litigating for the better part of a decade until the next redistricting occurred. Montana expended $19,543 in costs in the first two-week trial alone, and vacatur would presumably unfairly eliminate Plaintiffs' obligation for costs. (CR255.)

Petitioners incorrectly claim vacatur is routine procedure; in fact, this Court has substantially raised the bar for when it may be allowed. Montana asserts that this Court should do as it did in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994), and *Karcher v. May*, 484 U.S. 72 (1987): dismiss the petition and leave the lower court rulings, fully-litigated and finally-reviewed, intact. The equitable doctrine of vacatur requires a careful balancing of public and private interests because the public has a strong interest in sustaining precedent and developing decisional law. *U.S. Bancorp*, 513 U.S. at 26, 27. This Court has held that it applies the same strict analysis for vacating judgments under Fed. R. Civ. P. 60(b) to 28 U.S.C. § 2106 because vacatur, " . . . quite apart from any considerations of the fairness to the parties – disturb the orderly operation of the federal judicial system." *U.S. Bancorp*, 513 U.S. at 27.

> "Public interest in finality of judgment encompasses the development of decisional law, the importance of the opinion to nonparties, and the deterrence of frivolous litigation." See *Austin*, 181 F.R.D. at 286. It is particularly significant to preserve judgments where there has already been a substantial expenditure of judicial resources in the case. *Id.*

Carter v. Rosenberg & Estis, P.C., 1999 U.S. Dist. LEXIS 131 (S.D.N.Y. 1999).

Here, the case did not become moot until after the Ninth Circuit ruled for Montana the second time, so Plaintiffs' right of review can hardly be said to have been thwarted. As this Court noted in *U.S. Bancorp*, vacatur is reserved for only exceptional situations, as judicial precedents are presumed valid and the public interest not only demands an eventual end to litigation, but some stability in the law. The Ninth Circuit implicitly and correctly came to this same conclusion when, after ordering briefing sua sponte on this issue, it simply affirmed the panels unanimous opinion affirming Judge Pro's opinion on remand. (April 23, 2003 Order, App. at 148a-149a.)

3. If the Court determines that the case is not moot, it should deny the petition because the underlying decisions are correct. All of the opinions and judgments have applied the standard *Thornburg v. Gingles*, 478 U.S. 30 (1986) analysis and totality of circumstances tests, and all have concluded that Plaintiffs have not met their standard of proof. The essence of a voting rights act claim is that the boundaries themselves dilute the Plaintiffs' participation in the process. In *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) the Supreme Court stated:

> "Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter. See 42 U.S.C. § 1973(b)."

Both the trial court in 1998 and the court on remand made the requisite exacting scrutiny, and found the 1990 boundaries caused no vote dilution. None of the lower court judgments is contrary to the law of this Court or of other Courts of Appeal, and it is appropriate for this litigation, at long last, to end. (*Old Person, Hatfield*, App. at 86a-135a; *Old Person, remand*, 182 F. Supp. 2d at 1003-1020, App. at 27a-56a; *Old Person II*, 312 F.3d at 1037-1050, App. at 1a-23a.)

ARGUMENT

I. THE PETITIONERS' CHALLENGE TO MONTANA HOUSE DISTRICTS 85 AND 73 AND SENATE DISTRICTS 37 AND 43 OF THE 1990 MONTANA STATE LEGISLATIVE DISTRICTING DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY, AND SO THE PETITION MUST BE DISMISSED.

A. Petitioners Had Standing to Challenge Only the Districts in Which They Resided, and Those Districts No Longer Exist.

It is axiomatic that, " 'The jurisdiction of federal courts depends on the existence of a 'case or controversy' under Article III of the Constitution' . . . 'A case, or an issue in a case, is considered moot if it has lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law' " (citations and internal quotation marks omitted). *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797-98 (9th Cir. 1999). Petitioners admit that the adoption of the 2000 districting plan moots the case. (Pet. at 8). On April 23, 2003, after reviewing the parties' briefs on mootness

and satisfying itself that the case was still live, the Ninth Circuit denied rehearing and rehearing en banc. (App. at 148a-149a). On July 2, 2003, the Montana Secretary of State filed the superceding 2000 plan and ordered the election administrators to implement its boundaries for the next election. At that point this case became moot. Thus no justiciable controversy exists.

There can be no serious argument under *United States v. Hays*, 515 U.S. 737 (1995), that Plaintiffs have no standing to challenge districts in which they do not reside. See *Sinkfield v. Kelley*, 531 U.S. 28 (2000).

> "We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of the [jurisdictional] doctrines.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231, 110 S. Ct. 596, 607-608, 107 L. Ed. 2d 603 (1990) (citations omitted). It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, 515 U.S. at 742-43 (citations omitted). Federal courts may not " . . . adjudicate challenges to

state measures absent a showing of actual impact on the challenger, *see, e.g., Golden v. Zwickler*, 394 U.S. 103, 110 (1969)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997). Thus, this Court may not entertain the theoretical arguments Plaintiffs may wish to voice regarding who said what during a political hearing or the wisdom of creating Indian majority districts for the state legislative elections.

B. Petitioners Do Not Allege Injury From the Adoption of the New 2000 Districts, So There is No Longer a Justiciable Case or Controversy Before This Court.

The harm alleged here is that the 1990 district boundaries themselves dilute the Plaintiffs' votes. The injury alleged – dilutive districting – has been mooted by the adoption of the 2000 Commission plan and Petitioners have indicated they are not injured by that plan (Pet'r Applic. for Ext. of Time at 3; Pet. at 8). The precise issue was addressed in *Ruiz v. City of Santa Maria*, 160 F.3d 543 (9th Cir. 1998), "This lawsuit would be moot if, for example, Plaintiffs had moved out of Santa Maria or the City had already adopted a district election system" (citations omitted). *Ruiz*, 160 F.3d at 549.

Here the challenged districts can never again be the basis for an election because the well-documented and tremendous demographic changes that occurred in Montana between 1990 and 2000 make them severely malapportioned. (*Old Person, remand*, 182 F. Supp. 2d at 1018-19, App. at 52a-59a). No court could order the challenged boundaries reinstated. (*See* Appellees' Br., April 15, 2003, at 13); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Abate v. Mundt*, 403 U.S. 182, 185 (1971);

Karcher v. Daggett, 462 U.S. 725, 744 (1983); *Chapman v. Meier*, 420 U.S. 1, 26 (1975). Therefore, even if there were to be an additional future challenge to the 2000 districting and a court were to order changes to be made to that plan, no return to the 1990 districts is possible.

II. PETITIONERS ARE NOT ENTITLED TO VACATUR BECAUSE NO EXCEPTIONAL CIRCUMSTANCES EXIST TO SUPPORT IT, BECAUSE THE PUBLIC INTEREST IN FINALITY OF JUDICIAL DECISIONS WEIGHS AGAINST IT, AND THEIR RIGHT TO REVIEW WAS NOT TRUNCATED BY THE INEVITABLE MOOTNESS CAUSED BY ADOPTION OF THE NEW DISTRICTS.

A. This Court's Power to Order the Vacatur of a Lower Court Judgment Because of Mootness is an Extraordinary One, to Be Sparingly Used Only Upon Petitioners' Showing That Equity Demands Such an Action.

The statutory authority for vacatur is 28 U.S.C. § 2106. It provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The policy of directing a court to vacate a judgment when the matter becomes moot on appeal is not, as Petitioners allege, routine. In fact it was rejected by this Court

in both of the leading cases on the doctrine and should be rejected here. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994).

Further, "It is Petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 26. Petitioners have advanced no such argument. Here, mootness was simply the inevitable result of the Petitioners' commencement of action in 1996 and their continuing to litigate for the better part of a decade. Since Montana has always redistricted every ten years to account for population changes, mootness was inevitable.

In *U.S. Bancorp*, the Court addressed the equitable and extraordinary nature of vacatur.

> "As always, when federal courts contemplate equitable relief, our holding must also take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'"

513 U.S. at 26, 27. (citations omitted.) The court then refused, as had the Court in *Munsingwear*, to vacate the lower court judgment and simply dismissed the case as moot. *Id.* at 29.

The Court also pointed out that the oft-quoted statement in *Munsingwear* that vacatur has become established practice was dictum, and not entirely accurate even

for the time. 513 U.S. at 23. Petitioners' other authority is not persuasive, either. For example, in *Karcher v. May*, 484 U.S. 72 (1987), this Court did not grant vacatur, despite the fact that the case was, as is this one, no longer justiciable.

B. The Balancing of Public and Private Interests in Preservation of Judicial Precedent Strongly Weighs Against Vacatur Herein Because the Case Did Not Become Moot Until After a Second Review by the Ninth Circuit, Because the Matter is so Fact Specific That There Can Be No Future Litigation of the Issues Presented Herein, and Because the Public Interest in Judicial Finality Weighs Heavily in Favor of Allowing the Lower Court Judgments to Stand.

This Court explained the two primary purposes for exercising the authority granted in 28 U.S.C. § 2106 in *Munsingwear*. We explained that vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." 340 U.S. at 40. Neither of these purposes would be served by granting vacatur herein. Additionally, *U.S. Bancorp* requires the balancing of public interest in judicial finality against any demonstrated injustice from the procedure. *U.S. Bancorp*, 513 U.S. at 26, 27.

First, the purpose of "clearing the path for future relitigation of the issues between the parties" has no place in a section 2 Voting Rights Act claim relative to specific districts that exist no more. The facts giving rise to these claims can never recur – the demographics as well as the

districts themselves are no more – so encouraging relitigation is for naught. A future political or racial Voting Rights Act claim against the 2000 districts is necessarily another case, not a relitigation of this one. *See, e.g., Ruiz v. City of Santa Maria*, 160 F.3d 543, 556 (9th Cir. 1994). Litigants hardly need encouragement to litigate these issues and, as has been expressed so often by this Court, the need for some stability and certainty in this area is all too acute already. *See* discussion in *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996). On the other hand, the detailed findings and conclusions that were issued in the case provide some guidelines to future redistricters in Montana, however nebulous the matters of cohesion, geographic compactness, and communities of interest might be.

Second, the case herein did not become moot until after the second full substantive review thereof, so Petitioners' rights of appellate review on the merits have not been truncated. Petitioners have no right to review by certiorari in this Court. On April 4, 2003, the Ninth Circuit properly sought to inform itself whether the matter remained a live controversy, and sua sponte order briefing on the mootness issue and other procedural issues prior to issuing its second affirmance of the district court judgment for Montana. (Resp. App. at 1-2.) Only after that briefing was considered did the second affirmance issue on April 23, 2003. The unrelated state litigation was resolved and the 2000 plan filed on or about July 2, 2003, well after the Ninth Circuit ruled. Not only was this issue considered and the question of vacation of lower court rulings rejected, but the Ninth Circuit clearly had jurisdiction at the time it last ruled, a fact that distinguishes this case from *Arizonans for Official English v. Arizona*, 520 U.S. 43

(1997). This sequence is corroborated in the Petition. (Pet. at 8.) Having prolonged this litigation by every possible avenue, Petitioners should not be empowered to wipe the slate clean of unfavorable rulings, including an obligation for taxation of Defendants' cost for the first trial of $19,593, validly issued through the simple expedient of motions for extensions of time and, because of the inevitable redistricting, vacatur. Once the case became moot, Plaintiffs were not entitled to review by certiorari, and this Court cannot grant it.

Third, the public interest in finality of the judgment is strong. "As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.' *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (*Stevens, J.*, dissenting)." *U.S. Bancorp*, 513 U.S. at 26, 27.

This litigation produced lengthy analyses about the electoral process in Montana and, while the specific injury claimed cannot recur, the analyses have precedential value as a record of the totality factors at that time. Commissioners whose names were cleared in 1998 of the claim that they acted with discriminatory intent are entitled to the finality of that judgment. There is no injustice to Petitioners to allow the lower court judgments to stand, and every injustice to the judicial system, the public, and the state in taking that victory away, especially where obtained, as here, through the expenditure of considerable judicial resources. The precedent is "a public act of a public official, . . . not the parties' private property."

Dubrowsky v. Estate of Perlbinder, 268 B.R. 6, 8, 2001 U.S. Dist. LEXIS 17067 (E.D.N.Y. 2001) (quoting from *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993).

III. IF THIS COURT FINDS THAT THE CASE IS NOT MOOT, THE PETITION SHOULD BE DENIED BECAUSE THE LOWER COURT DECISION IS CORRECT BOTH WITH RESPECT TO THE DISCRIMINATORY PURPOSE CLAIM AND TO THE DISCRIMINATORY EFFECTS CLAIM.

If this Court were to find the matter reviewable, the petition should be denied. A complete review of the record reveals that the trial court rulings and the Ninth Circuit affirmances were fully supported by the record and comply with applicable law. Regarding the intentional discrimination claim, *Old Person I* noted that the Commission, in fact, significantly increased the number of Indian majority districts, did not deviate from its established criteria, and did not burden Indians more than whites. *Old Person I*, 230 F.3d at 1130-31 (9th Cir. 2000) (App. at 84a). "We agree with the district court that there was insufficient evidence of discriminatory purpose on the part of Commission members in adopting the plan, and affirm the court's ruling on that claim." *Old Person I*, 230 F.3d at 1117 (9th Cir. 2000). (App. at 58a.)

Regarding the Voting Rights Act results claim under section 2, the record also reflects that each court to hear the matter appropriately applied the *Gingles* tests to determine if, from an "exacting review" of the practical circumstances of electoral politics in the challenged districts, the minority is deprived of an equal opportunity to elect the candidates of their choice. (*Old Person I*, at

1120, App. at 64a-65a: *Old Person remand*, 182 F. Supp. 2d at 1006-1017, App. at 33a-48a.)

Any error in the appellate decisions was in Plaintiffs' favor. For example, writing for the panel in *Old Person I*, Judge Canby had recalculated the voting statistics to conclude that the white voters usually voted as a bloc to prevent the Indian-preferred candidates from winning. Thereafter, however, the Indian-preferred candidates in fact won – in three of the four challenged districts – twice. The Indian-preferred candidate had always won in one of the four challenged districts (HD 85), but the Ninth Circuit had ruled that these results could not be counted in the white bloc voting calculation throughout the challenged area. (*Old Person I* at 1127, App. at 77a.) That analysis left the white bloc voting calculations inevitably skewed to Plaintiffs. If *Old Person I* correctly concluded that cohesion and white bloc voting usually occurred, then it must be admitted that such calculation did not accurately predict future voter behavior in those districts. Nevertheless, *Old Person I* correctly remanded for a totality determination and the court on remand took a great deal of evidence regarding access to the electoral process. The ultimate result was a correct ruling in the ultimate issue and an affirmance of that decision.

Upon review of the entire record, the district court on remand noted the record demonstrated that only four districts were before it, and three had elected Indian-preferred candidates. One of those, HD 85, had always done so. Judge Pro followed the mandate of the Ninth Circuit to apply the totality test of *Thornburg v. Gingles*, ruling that the repeated successes of the Indian-preferred candidates in the challenged districts precluded a finding of vote dilution. *Old Person, remand*, 182 F. Supp. 2d at

1015, 1016. (App. at 48a.) He held that the essence of a vote dilution claim is proof of unequal access to the electoral process and, logically enough, that the Indians repeated electoral successes in the districts in issue refuted the notion that American Indians were denied equal access to the process. *Old Person remand*, at 1016, App. at 48a.

The Ninth Circuit in *Old Person II* correctly affirmed. Plaintiffs had offered no witnesses on remand with personal knowledge of the totality factors. *Old Person II*, 312 F.3d at 1043, App. at 11a. The 2000 Commission was by then fully engaged and working toward the inevitable new districts. The essence of the section 2 claim is that the boundaries themselves disadvantage the voters. *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993). Here, the district court concluded: "The parties have not presented new evidence with respect to this factor, and hence there is a notable lack of evidence that American Indians would fare any better in terms of their access to the political process if this Court were to order immediate district boundary changes" (*Old Person, remand*, 182 F. Supp. 2d at 1013, App. at 44a). On the record presented in 2001, therefore, the district court inevitably concluded that vote dilution had not been shown.

The district court's weighing of the factors is subject only to the clear error rule because there is no bright line test. (*Old Person I*, 230 F.3d at 1119, App. 62a.) In *Johnson v. De Grandy*, 512 U.S. 997 (1994), this Court observed that "the degree of probative value assigned to proportionality may vary with other facts. No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." 512 U.S. at 1020-21.

The trial court judges were in the best position to view the evidence and determine the veracity of the witnesses. *Georgia v. Ashcroft*, ___ U.S. ___, 123 S. Ct. 2498 (2003). There is no clear error, and so no reason, certainly no compelling reason, to grant the petition herein. In any event, after seven years of litigation attempting to prove the dilutive effects of the 1990 districts, the 2000 districts were adopted in the regular course of decennial redistricting and the case is now moot.

CONCLUSION

The petition for certiorari should be dismissed in its entirety for lack of jurisdiction, or alternatively denied.

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October 17, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL OLD PERSON, et al., Plaintiffs-Appellants, v. BOB BROWN, Secretary of State for the State of Montana, et al., Defendants-Appellees.	No. 02-35171 D.C. No. CV-96-00004-PMP District of Montana, Great Falls ORDER (Filed Apr. 4, 2003)

BEFORE: THOMAS, Circuit Judge and En Banc Coordinator

The parties shall file briefs on or before April 11, 2003, addressing the question of whether this case is now moot because of any actions conducted pursuant to Article V, § 14(4), *Constitution of Montana*, subsequent to the order of the district court in this case, including the submission of a new redistricting plan by the Montana Districting and Apportionment Commission. The parties shall advise the Court on the status of the new redistricting plan, including a discussion of the pending state litigation pertaining to the plan filed by the Montana Secretary of State, and any legal significance thereof as it applies to this case.

The parties are encouraged to discuss the impact, if any, of the following cases and their progeny: *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), *United States v. Sibron*, 392 U.S. 40 (1968) and *Moore v. Ogilvie*, 394 U.S. 814 (1969). The parties shall also address the significance of any pertinent Montana constitutional and statutory law.

The briefs shall conform to Fed. R. App. P. 32 in form, except that the cover sheet may be on white paper. The briefs shall not exceed fourteen (14) pages or 7,000 words. The briefs should be faxed to the Clerk of Court in San Francisco, CA, by 4:00 P.S.T. on April 11, 2003. The facsimile number is (415) 556-9721. The parties shall also post to the Court on that date, by express mail, or other similar service, an original and fifty (50) copies of the brief.

The parties are also directed, pursuant to Fed. R. App. P. 10(e) to submit a copy of the complaint filed by the Montana Secretary of State pertaining to the new redistricting plan and a copy of the state court docket sheet pertaining to the action.

Supreme Court, U.S.
FILED
OCT 3 0 2003
OFFICE OF THE CLERK

No. 03-253

IN THE
Supreme Court of the United States

EARL OLD PERSON, CAROL JUNEAU, JOE MACDONALD, AND JEANNINE PADILLA,

Petitioners,

vs.

BOB BROWN, SECRETARY OF STATE FOR THE STATE OF MONTANA; AND JUDY MARTZ, GOVERNOR FOR THE STATE OF MONTANA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. This Case Has Become Moot; the Judgment Below Should Be Vacated and the Case Remanded with Directions to Dismiss

Defendants admit that this case has become "moot" and that "no justiciable controversy exists." Brief in Opposition at 12.[1] The only dispute between the parties is whether the Court should reverse or vacate the judgment below and remand with a direction to dismiss pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) .

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1. The final judgment of the court of appeals was issued on April 23, 2003, App. 148a, while the case did not become moot by virtue of the filing of a new redistricting plan by the independent Districting and Apportionment Commission until July 2, 2003. *See* Brief in Opposition at 17.

A. Defendants Seriously Misrepresent the Decisions of this Court Treating Mootness and Vacatur

Defendants erroneously claim that the decision in *Munsingwear* "rejected" the "policy" that moot civil cases should be vacated and remanded by the Court with directions to dismiss. Brief in Opposition at 14. To the contrary, in *Munsingwear* the Court held:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

340 U.S. at 39. In *Munsingwear*, however, the United States, which was the petitioner, made no motion to vacate the adverse judgment of the district court on mootness grounds but instead acquiesced in dismissal of its action by the court of appeals. Under the circumstances, the Court held that the United States had waived or "slept on its rights," and could not raise the issue of dismissal for the first time in the Supreme Court. *Id.* at 40 (the United States "did not avail itself of the remedy it had to preserve its rights"). But as the Court stressed, dismissal on mootness grounds "is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41.

In addition, the "established practice" described in *Munsingwear*, 340 U.S. at 39, was not merely "dictum" as defendants contend. Brief in Opposition at 15. It was described by the Court as "the standard disposition in federal civil cases," citing some 33 Supreme Court decisions which had applied the mootness/dismissal principle. *Id.* at 39 n.2. Indeed, prior to *Munsingwear*, the Court held in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936), that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss" (emphasis supplied).

Defendants also misrepresent the holding in *Karcher v. May*, 484 U.S. 72 (1987). The Court in fact approved the mootness/dismissal principle articulated in *Munsingwear* and subsequent cases, *citing Burke v. Barnes*, 479 U.S. 361, 365 (1987) (vacating as moot and remanding with instructions to dismiss), and *United States Department of Treasury v. Galioto*, 477 U.S. 556, 560 (1986) (vacating the judgment of the district court), but concluded that appellants were "not parties to this case" and thus lacked standing to assert a mootness/dismissal argument. 484 U.S. at 83. Nothing in *Karcher* remotely suggests that vacatur is not appropriate here.

Defendants' reliance upon *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), is completely misplaced. There, the Court held that mootness by reason of a settlement among the parties did not justify vacatur of the judgment under review. As important, the Court described *Munsingwear* as "[t]he leading case on vacatur," and concluded that:

> vacatur must be decreed for those judgments whose review is, in the words of *Munsingwear*, "'prevented through happenstance'" - that is to say, where a controversy presented for review has "become moot due to circumstances unattributable to any of the parties."

Id. at 22-3 (*quoting Karcher v. May*, 484 U.S. at 82). The Court also expressly affirmed the "equitable tradition of vacatur," *i.e.*, that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25. That is precisely the situation here. Plaintiffs challenge to Montana's 1990 legislative redistricting plan was frustrated, not by a settlement between the parties, but by the vagaries of circumstances - the adoption of a new plan by the state's independent redistricting commission based on the intervening 2000 census. *U.S. Bancorp Mortgage Co.* supports, and indeed requires, vacatur in this case.

B. Defendants' Discussion of the Public Interest Is Erroneous

Defendants misrepresent the discussion in *U.S. Bancorp Mortgage Co.* concerning the role of the "public interest" in granting or denying vacatur. What the Court actually said was, "the public interest is best served by granting relief [*i.e.*, vacatur] when the demands of 'orderly procedures ' . . . cannot be honored ." 513 U.S. at 26-7. It is only when those procedures can be honored, but are "voluntarily abandoned" by a settlement agreement of the parties, that vacatur may be inappropriate. *Id.* at 28.[2] As noted above, the orderly procedure of review by this Court was not voluntarily abandoned by plaintiffs but is unavailable because of mootness. The public interest here, and as *U.S. Bancorp Mortgage Co.* provides, is best served by vacatur.

The defendants' argument that "the public interest in finality of the judgment [in this case] is strong," Brief in Opposition at 18, is exactly the reverse of what the Court held in *U.S. Bancorp Mortgage Co.*, upon which defendants primarily rely. There, the Court held that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment." 513 U.S. at 25. As is apparent, litigants and the public have no legitimate interest in rulings that are "only preliminary," *Munsingwear*, 340 U.S. at 40, and that are denied review by "the vagaries of circumstances." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25.

Dubrowsky v. Estate of Perlbinder, 268 B.R. 6, 2001 U.S. Dist. LEXIS 17067 (E.D.N.Y. 2001), relied upon by defendants in their Brief in Opposition at 18-9, aside from being a district court opinion and thus not binding upon this Court, does not support defendants' argument. There the

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2. While the Court denied vactur, it was careful to note that "[t]his is not to say vacatur can never be granted when mootness is produced in that fashion [as the result of a settlement agreement]. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course." 513 U.S. at 29.

district court, relying upon *U.S. Bancorp Mortgage Co.*, declined to vacate its prior decision pursuant to a subsequent settlement agreement among the parties. In this case, by contrast, there is no settlement agreement. The principle in *Dubrowsky* that settlement precludes vacatur has no application here.

C. Defendants' Arguments Are Contradictory and Misapprehend the Rationale for Vacatur

Defendants' arguments that "no justiciable controversy exists," Brief in Opposition at 12, but that it would be an "injustice . . . in taking that [defendants'] victory away," *id.* at 18, are contradictory and misapprehend the rationale of vacating decisions that have become moot on appeal. The arguments are contradictory because if there is no "controversy" there can be no "victory" or defeat.

Defendants' arguments misapprehend the rational for vacatur for the reasons explained by the Court in *Munsingwear*, 340 U.S. at 40, that "[w]hen that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." Vacatur as a matter of law does not deprive defendants of anything to which they are entitled nor prejudice them in any way.

Similarly, vacatur would neither "clear[ ]," Brief in Opposition at 18, nor besmirch the names of the members of the 1990 redistricting commission nor resolve the issue of whether they acted "with discriminatory intent." *Id.* Such determinations would be left where they were before the litigation, to the judgment of history based upon the contemporaneous record of the commission's deliberations.[3]

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3. The district court detailed some, but not all, of the obvious bias of members of the commission toward Indians and their proposed redistricting plans. *See, e.g.*, 131a (describing the tribe's demographer as a "jackass," an "S.O.B." and a "bugger"); 132a (suggesting that all the Indians in the state be packed in "one District"); 133a (complaining that placing whites in a majority Indian district would "emasculate a few more white voters"); 133a (continued...)

See Munsingwear, 340 U.S. at 40 (when vacatur is granted "the rights of all parties are preserved").

D. Plaintiffs Have no "Obligation" for Taxation of Defendants' Costs

Defendants make the factually and legally erroneous claim that plaintiffs have "an obligation for taxation of Defendants' cost for the first trial of $19,593, validly issued." Brief in Opposition at 18. To the contrary, costs have never been taxed in this case. The district court entered an order on November 30, 1998, postponing taxation of costs pending appeal and final determination whether defendants were entitled to costs. Accordingly, there is no judgment that plaintiffs are obligated for costs for the first trial in this case. Moreover, the application for costs submitted by defendants was grossly excessive and included items that were not allowable as costs and for which there was no or inadequate documentation. The application would be deniable on that basis alone.

Even if defendants had been awarded costs, which they were not, that award would be eliminated through vacatur. *See Munsingwear*, 340 U.S. at 40 (vacatur "eliminates a judgment, review of which was prevented through happenstance"). Defendants would have no entitlement to a judgment of costs "which in the statutory scheme was only preliminary." *Id.*

If defendants mean to suggest that they would be entitled to an award of costs to be made at some time in the future, then plaintiffs would have a right of review of any such award on appeal. *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991) (reviewing an award of costs and fees). But a case cannot be, as defendants concede, "moot" and present "no justiciable controversy," Brief in Opposition at 12, and still be actively litigated in federal

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3. (...continued)
(describing a tribal proposal to keep the Rocky Boy and Fort Belknap Reservations in one district as "idiotic" and "a bunch of crap").

court. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1977) (a controversy must be "extant" at all stages of review). The absence of a case or controversy would preclude a future award of costs to either party, just as vacatur would eliminate any judgment that might have been entered.

E. Defendants' Claim that this Court "Cannot" Grant Certiorari Is without Merit

Defendants contend that once this case became moot, plaintiffs "were not entitled to review by certiorari, and this Court cannot grant it." Brief in Opposition at 18. The claim ignores the jurisprudence and jurisdiction of the Court. In *Burke v. Barnes*, 479 U.S. at 365, for example, the Court granted a petition for writ of certiorari in order to vacate the decision of the court of appeals on mootness grounds and remanded with instructions to dismiss the complaint. Similar relief has been granted in other cases on a petition for writ of certiorari. *See, e.g., Duke Power Co. v. Greenwood County*, 299 U.S. at 267; *Allen v. Ellisor*, 454 U.S. 807 (1981); *Board of Governors of the Federal Reserve System v. Security Bancorp*, 454 U.S. 1118 (1981). If, as defendants contend, the Court "cannot" grant certiorari in cases such as this it would have been without power to take the action it took. Plainly, defendants' argument that the Court cannot grant certiorari in this case is without merit.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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